# LAW RELATING TO
# FORNICATION (ZINA)
## in the Islamic Legal System - A Comparative Study

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*BY*

SYED AHMED
B.A., LL.M.

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# DEDICATION

TO MY PARENTS

who brought me up to be what I am today.

SYED AHMED
B.A., LL.M. (Osm.)

*Residence:*
H. No. 20-7-513/2,
Taleem Mallad,
Inside Fateh Darwaza,
Hyderabad - 500 065
(A.P.) India

January, 1st 1999

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—AUTHOR.

# ABOUT THE AUTHOR

Mr. Syed Ahmed was born on July 20, 1942 in Hyderabad in a respectable family of Sadaate-e-Bani-Hashim. He has had his early education in Darul-Uloom High School, Hyderabad then he continued his education in Nizam College and Law College and got B.A., LL.M. Degrees from the Osmania University, Hyderabad. He took active part as a Student Leader in Schools and Colleges. Fought tooth and nail for the cause of the student community. He is the Secretary-General of All India Budokan Karate Federation and World Budokan Confederation. He is the Chief Editor of Budokan Update, a monthly Martial Arts Magazine.

He associated himself with Star Karate Club as a General Secretary and was awarded Black Belt Sandan and also Honoured as Grand Master's Representatives in India by Mr. Chew Choo Soot, Grand Master, Karate Budokan International. Organised Karate Meet on National and International levels four times at Hyderabad in 1985, 1987, 1993 and 1996. He is the District Chairman, Lions Clubs International, Dist. 324-C2 and also associated with several Religious, Cultural and Sports Organisations. He visited Saudi Arabia and performed Haj Pilgrimage thrice. Mr. Ahmed had visited Malaysia in October and participated in the International Karate Meet on 15th November, 1989 at Kaulalumpur. He also visited Thailand and Singapore for higher training in Martial Arts.

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# LAW RELATING TO FORNICATION (ZINA) in the Islamic Legal System - A Comparative Study

## *INTRODUCTION*

### I. AREA OF RESEARCH :

The research presented herein, under the title "The Law relating to Fornication (**Zina**) in the Islamic Legal System - A Comparative Study" is a subject of considerable significance. The word 'fornication' is all comprehensive. It includes all forms of illicit sexual intercourse including adultery. The interesting feature of the subject of our study is that Islam attempts at the enforcement of this moral aspect of life by means of law.

Besides discussing about the law of fornication in the Islamic legal system, we may also have to deal to some extent, how far fornication was considered a punishable offence in the primitive society and what, if any, was the concept of chastity and marriage among the savage people? We may, in this connection, have to dwell upon the idea of chastity, marriage and fornication in the various religious systems of the world, as for example, Hinduism, Buddhism, Judaism, Christianity, as also in the old civilized countries, like Egypt, Greece and Rome.

Fornication in Islam is an illicit sexual relationship between two opposite sexes, who are not legally married. Islam regards fornication as a heinous crime, **haram** and prescribes the punishment of a hundred stripes for the unmarried and stoning to death for the married partners in the crime; the punishment, however, is half, that is, fifty stripes only, in both the married and unmarried cases in respect of slaves.

Islam regards fornication also as the root cause of several other evils which may crop up in a society. Islam holds that fornication hits at the moral values of human beings. Fornication, it is observed, is likely to create vengeance among expectators which may culminate in crimes such as kidnapping, abductions and even homicide. In the event of the fornicatress begetting a child, the problem of legitimacy, right-in-succession, maintenance and future of the children would also arise.

Islam exhorts every man and woman to abstain from **zina** and to safeguard the private parts against their ill-use. The Qur'an says

And come not near unto fornication. Lo! it is an abomination (obscenity) and an evil way.[1]

ولا تقربوا الزنا انه كان فاحشة وساء سبيلا۔ (قرآن)

Prophet Mohammad once said that a person should deem the organ in between his thighs as his arch enemy :

The part (ambition) as it lies in between the thighs is thine enemy.

اعدى عدوك نفسك التى بين جنبيك۔ (حديث)

Islam also takes care to prescribe all such measures as would help a person to save himself from falling a prey to such an obscenity, abomination and evil way. They are both positive and negative. A few such measures are, prescription of legal forms of matrimonial ties and their easy dissolution in case of non-adjustment between the parties, conditional permission for polygamy, system of bond-maids and prohibition of music, love songs and dance, free-mingling of the sexes, and use of intoxicants and the observance of seclusion **(hijab)** and **Istezan** etc. And Islam has also prescribed deterrent punishment to a Muslim who commits this offence despite the grip of such positive and negative measures designed to check the evil in a Muslim society. We may have to see in detail, how far these methods are effective to check this offence.

1. Qur'an (17:32)

## II. SIGNIFICANCE OF THE TOPIC :

The religion of Islam attributes several of the present day offences to the crime of fornication. The present day man is admittedly, keen to know the why and wherefor of, and to evolve methods to check and control, the present high ratio of divorce, the speedy spread of V.D., AIDS very many instances of kidnapping, rape and abduction and forced marriages and problems of illicit pregnancy, unmarried mothers and illegitimacy of the offspring. In this context, it would be of much significance to study how far Islam provides a solution to these problems, and how does the Islamic legal system classify them in its penology. A study of the penal provisions relating to fornication, which Islam deems to be a heinous crime, would also be of much value. Furthermore, fornication has been considered an evil and crime, even in the primitive societies as also in the other major religions of the world. It would, therefore, be interesting to know how the 'crime' of fornication has been dealt with by them *vis-a-vis* the Islamic legal system.

## III. CO-RELATION OF THE TOPIC WITH THE MAIN SUBJECT

The law in Islam is called **"Fiqh"**, it is the name given to the whole science of jurisprudence because it implies the exercise of intelligence in deciding a point of law in the absence of **nass** (binding ordinance), the Qur'an and the Sunna.

Law, **hukm** according to Mohammadan Jurists, is "that which is established by a communication, **khitab** from God with reference to men's acts expressive either of demand or indifference on his part, or being merely declaratory.[2]

The first postulate, therefore, of Islamic jurisprudence is faith, **iman** the essential constituent of which is belief in God and acknowledgment **(tasdiq)** of His authority over man's actions. Ibn Khaldun defines **fiqh** as "the knowledge of the rules of God which concern the actions of persons who owe themselves bound to obey

2. Abdul Raheem, *Mohammadan Jurisprudence*, Madras 1911, p.51.

the law respecting what is required, **wajib**, forbidden, **mahzur** recommended, **mandub** disapproved, **makruh** or merely permitted **mubah**; such knowledge is acquired from the Qur'an, the Sunna and such arguments as the legists may adduce for the necessary comprehension of the laws contained in them. It is the body of rules derived by these legal arguments that is called fiqh.[3] This science combines with that of **kalam**, or dogmatic and scholastic theology, to form the science of the **shar,** or **sharia** which means literally the "path" or 'road' (of the theocracy of Islam of which Allah is the Head and Inspiration) and hence "the law" of Islam. But it does not correspond merely to the 'canon' law of Christianity for it comprises, by definition, all the laws compiled in Islam by those competent to act in this matter.[4]

The main object of the Sharia is to base human life on **Ma'rufat** (virtues) and to cleanse it of the **Munkarat** (vices). The term **Ma'rufat** denotes all the virtues and good qualities that have always been accepted "good" by the human conscience. Conversely, **munkarat** denotes all the sins and evils that have always been condemned by human nature as 'evil'. In short, the **ma'rufat** are in harmony with human nature and its requirement in general, and the **munkarat** are just the opposite.

The **sharia** (canon law) comprises the entire human activity concerning every aspect of Muslim life in order that virtues may flourish and vices may not poison human life.

The **sharia** shapes the Islamic society in a way conducive to the unfettered growth of goodness and truth in every sphere of human activity and gives full play to the forces of good in all directions. And at the same time, it removes all impediments in the path of virtues; side by side with this, it attempts to remove evils from its social scheme by prohibiting vice, by obviating the causes

3. Ibn Khaldun, Prolegomenes, Ed. Quatremere, Paris, 1858, I. See further, *Law in the Middle East*, M. Khaddury and H.J. Liebesny, I origin and development of Islamic Law.
4. Reuben Levy *The Social Structure of Islam*, Cambridge. At the University Press 2nd Edition, 1962, p.150

of its appearance and growth, by closing the inlets through which it creeps into society and by adopting deterrent measures which obstruct in making its appearance therein. Further **sharia** does not view a part of life in isolation from the organic whole. It does not also approve of a part of the Islamic legal system being separated therefrom and bracketed with some other system of life. Sharia claims to function smoothly and demonstrate its efficacy only if the *entire* system of life is practised according to it and *not* otherwise.

In such a case it need not be stressed how our subject of study *viz.* "the Law relating to Fornication in the Islamic Legal System" has a direct bearing upon the main topic *viz.*, Islamic Jurisprudence.

## IV. SCOPE OF THE TOPIC :

This book consists of six Chapters besides an introduction and a conclusion. The first Chapter seeks to make a study of the concept of chastity and adultery in the primitive society and the older civilizations of Egypt, Rome and Greece as also the major religions of the modern World. Chapter-II deals with the penal laws of Islam with special reference to **hudood** and the tendency of the Muslim Jurists towards **hadd** punishment. The third Chapter details the nature and scope of fornication and the mode of evidence and punishment therefor in accordance with the Hanafi law. Chapter-IV dwells upon the measures to check fornication as prescribed under the Islamic law. These measures include both positive as well as negative steps, which Islam proposes for the Muslim Society. Chapter-V attempts at a study of the Indian law relating to various crimes of the sex : Rape, Adultery, Unnatural Sexual Offences and Suppression of Immoral Traffic in Women and Girls Act, to enable one to make a comparative study of the Islamic law of fornication *vis-a-vis* the Indian laws thereon. The last Chapter-VI views at certain contemporary problems of pre-marital, extra-marital and abnormal sexual relations as existent in the modern society. These problems are suggestive of the working of laws relating to abnormal sexual behaviour in the contemporary world. And the book concludes with

the modern controversy over the question, "ought morality to be enforced by law"? It takes the view that morals too can be legally enforced in the interest of the preservation of the society and this is what, Islam too aims at.

## V. UTILITY OF THE WORK :

### (1) Utility to Researchers :

Sexual pleasure of any kind outside the marital tie is condemned by Islam. In our present society, two views are prevalent, one holding that all sex expression is confined, by law, to marriage, and the other holding that there is no such restriction whatsoever. Complete sex freedom outside the marriage tie would mean that there would be no incentive or reward for fidelity, for marriage and an organised family life. Thus a total licence with respect to sexual intercourse may create problems like those of illicit pregnancy, abortions, illegitimate children, V.D., AIDS and so on. This aspect, therefore, provides ample scope for researchers to study the sexual behaviour of males and females in the various countries where the aforesaid views about sexual pleasure are predominant. This would also enable one to know the ill-effects, if any, of the sexual liberty outside the marital tie. The present society, as we know, is suffering from various abnormal sex relations such as masturbation, lesbianism, homo-sexuality, hetero-sexuality and the like and a researcher would really be interested to learn the claims and counter-claims of the aforesaid two views about sexual pleasure and the desirability of enforcement of morals through law.

### (2) Utility to Legislators :

Fornication, as such, is not forbidden by law in the majority countries of the world. But we find, however, that adultery is a crime in almost all the nations; there is a marked difference between the two. So far as our study of the subject from the point of view of its utility to the Legislators is concerned, we may have to examine the various provisions of Indian law relating to adultery and other allied offences *vis-a-vis* the law of fornication in Islam and its penal

provisions, to help the Legislators in enacting such provisions, as would be appropriate to achieve the results as set out in the statement of objects and reasons of a bill in case such problems are under the process of legislation.

In India, we find a provision under Section 497 IPC which provides punishment of an adulterer man but exonerates the abettor woman. Certain Legislators do feel the presence of the lacuna in this provision. Again, we have here in India, enactments such as Suppression of Immoral Traffic in Woman and Girls, and certain penal provisions for, rape and certain unnatural sexual offences. A study of the Islamic legal system in relation to those offences can provide ample scope for the Legislators to view such enactments on a comparative basis and to know for themselves the relative advantages and disadvantages of these laws. This will naturally help them to make, if need be, necessary improvements to the existing laws or laws that are in the making. They would also, in a way, be guided in setting, measures of check and control or degrees of punishment for each such offence. Even minor aberrations, like eye-teasing, exhibitionism, saliromania, coprolalia, transvestism, pygmatonism, fetishism, voyeurism, and bottom-pinching, which are not punishable so severely and are, therefore, increasing in ratio day by day, can be viewed in a legal aspect.

**(3) Utility to Reformers :**

Subjects of interest and utility to the Legislators are usually subjects of interest to the social reformers. Fornication in its wider concept, and its manifestations in varied forms, is abominable to human nature. Human nature does not approve of pollution, abnormal sexual behaviour and irresponsible social contacts. The reformers of today are indeed vexed with the various sexual problems and crimes arising therefrom, now facing the modern society. Immoral traffic among women and girls is, no doubt, forbidden by law on an international plane, but a reformer knows it for a fact that the result is quite disappointing. The permissive society of today is posing a challenge to the social reformer and each day brings with it, a new problem. Family disorganisations, judicial separations,

increasing divorces, prostitution, illegitimacy of the children and unmarried mothers are as important topics of study for a social reformer as they are for a Legislator. Again the increase in offences and crimes of all types is also agitating the minds of social reformers.

In the field of sexual pleasure, Islam claims that its laws relating to fornication will prove a panacea for the present day evils. Islamic legal system, approve of very deterrent measures of punishments, which are rather unthinkable in the present day progressive world. But it would be of much academic value to a social reformer if he makes a study of the subject from the point of Islamic law since historians do admit that during the first phase of the implementation of the Islamic Civil and Criminal laws (*viz.* until the reign of the first four Caliphs) the society underwent certain ideal changes and minimised offences to the utmost.

Our study, therefore, evinces interest to the social reformers also who are, at sea now, as to how they can educate public against sexual crimes and inculcate in man self-discipline and self-control.

This subject of the Islamic jurisprudence will thus provide us an ample scope to go into the study of the law relating to a major social problem of today inasmuch as it attempts at a study of the legal systems of different ages and major religions of the world in regard to sexual pleasure. The subject also affords an opportunity to study the modern trend of banishing private morality from the premises of public law, in the light of a divergent view of Islamic jurisprudence that **ma'rufat** (virtues) and **munkarat** (vices) can form a valid subject to any legal system and that the legal enforcement of morality is indispensable for the preservation of a society from being degenerated.

# *Chapter - I*

# CONCEPT OF CHASTITY AND ADULTERY

"Chastity once tarnished can never be restored", goes the common saying. The safeguard of chastity is a natural phenomenon with every man and woman. Human nature does not approve of unchastity, immodesty and immorality.

From a study of the Islamic law of fornication, it appears, that Islam attempts at a zealous preservation of this natural and inherent trait of man. The Prophet once said :

الحياءُ شعبة من الايمان.(حديث)

"Modesty is a part of the faith". Once a young man came to the Prophet of Islam and sought permission to fornicate. The companions of Prophet Mohammad (Peace be upon him) were outraged at this ill-mannered questioning of the youth, but the prophet called him nearer and put him to answer a few questions :

| | |
|---|---|
| Prophet : | Do you like this fornication (for which you now seek my permission) in respect of your mother? |
| Young man : | No, O' Prophet ! |
| Prophet : | Others too do not like this evil in regard to their mothers. |
| Prophet : | Do you like it in respect of your daughter? |
| Young man : | Oh! No, my dear Prophet. |
| Prophet : | Other people too do not approve of this evil-deed in regard to their daughters. |
| Prophet : | Can you endure this evil in regard to your sister? |
| Young man : | Never, O' Prophet. |

Prophet : Others too do not endure this impurity and unchastity in case of their sisters.

Prophet : Well, do you like this evil-deed in respect of your aunts?

Young man : No, O' Prophet.

Prophet : Others too cannot endure this evil in regard to their aunts.

The Prophet then prayed Allah to forgive this young man, to purify his heart and to safeguard his private part.[1] In this manner, the Prophet of Islam impressed upon the young man as well as his assembly there that fornication is by nature an abominable object and no man on earth would, if true to his conscience, endure the adulteration, pollution or contamination of the modesty of his mother, daughter, sister, aunt or for that matter, any of his kith or kin, through illicit cohabitation.

This high moral value of life has been sought to be enforced by means of law since time immemorial. Without attempting to justify at this stage the enforcement of morals through law, as this in itself drags one to the criticism of the arguments of John Stuart Mill going against such enforcement and of Lord Devlin and James Fitzjames Stephen favouring such an enforcement of morals through law, we will confine our discussion here to the way in which this ideal of life has been preserved or destroyed.[2] It is an irony that man has always tried to suppress this human nature and devised for himself several ultra methods, particularly when the very concept of a woman's status was that of no more than a chattel and male successor was

1. Tafsir Ibn-e-Kathir, Vol. III p. 38.
2. Mill in his essay on Liberty, Chapter I, says, "the only purpose for which power can rightfully be exercises over any member of a civilised community against his will is to prevent harm to others." James Fitzjames Stephen in his book "Liberty, Equality, Fraternity" (2nd Ed., London 1874) says that law should be "a persecution of the grosser forms of vice" while Lord Devlin in his essay on "The Enforcement of Morals" (Oxford University Press, 1959) argues that, "the suppression of vice is as much the laws business as the suppression of subversive activities."

deemed to be an indispensable element for one's salvation in the life Hereafter. A study of the primitive society and the older civilizations throws ample light upon the fact that man has tried to legalise all unlawful forms of sexual intercourse in his struggle against satisfying the human tendency of upholding chastity. It is noteworthy that lesser the impact of chastity on human civilization, greater the forms of satisfying man's lust. We, therefore, find that the universal forms of illegal cohabitation had been acknowledged, in some form or the other, as different forms of marriage.

## CHASTITY AND ADULTERY

### (1) Among the Primitive and Savage People :

Woman in the primitive society was conceived as belonging to man and any interference of another man with her would immediately outrage man's intensive sense of property, and would at once arouse his jealousy. He would, therefore, try to recover his property from the thief; and this could be done by assaulting or killing him or, in other words, punishing him for his 'theft'. Recognising too, that the woman, differing from other possessions of his, was a sentimental being, and, therefore, to some extent a consenting party to the 'theft', he would also vent his anger upon her, even putting her to death in case of extreme rage.[3] Woman before and after marriage was deemed the property, first of her father or guardian, next of her husband. Among peoples who allowed licence before marriage, none was permitted after it, when the husband assumes proprietory rights over the woman. And where such licence was not allowed, any unchastity was punished by inflicting a fine or death on the man who had depreciated the value of the woman in her guardian's or prospective husband's eyes. Husband's power so far as it concerns interference with her sexually was unlimited. Even in cases where polyandry was permissible under the tribal or local custom, the several husbands, whose right over her were arranged according to strict rule, would resent the

3. James Hastings; *Encyclopaedia of Religion and Ethics*; New York, 1908 page 122.

approach of any other man (stranger) to their common wife. To cite an example, among the Nairs, with whom polyandry assumes another form, the woman is not allowed to have any later sexual relations with the man, who first consummates the marriage, while any relation with a man not of her caste is *ipso facto* adultery and was formerly punished by death.[4]

**Adultery deemed a theft :**

A strong argument against the existence of primitive promiscuity can be found in the study of several primitive societies. Miss Kingsley observes that dire punishments are meted out to the wife even on the slightest suspicion, or, as among the Negroes of Calabon, the wives are at intervals put through a trying ordeal to test their faithfulness.[5] Westmark points out when adultery has actually taken place and has been discovered, the husband, with few exception, can himself punish the offending woman and her paramour, without necessarily invoking the local tribunal.[6] Indeed that tribunal or the tribal custom expects him to do so or fully approves of his act, though in some instances he may be retaliated upon by the relatives of the woman or the man, where he has killed either or both.[7] Punishment to the adultress varies but very frequently death is meted out in case of detected adultery; in other cases the woman is disfigured or mutilated by shaving off her hair, cutting of her nose, ears etc. Towards the offending man, the husband's attitude varies; he may kill him, emasculate, mutilate, wound, or flog him, or make him his slave, or force him to pay a fine, or to have his wife outraged in turn. Especially noticeable is the idea of theft in adultery, where, as in Africa, the man's hands are cut off as if he were a thief[8] and in the Torres Straits, there is no word for adultery apart from theft (Puru) and all irregular

4. Reclus, Primitive Folk, 162-164; quoted by *Encyclopaedia of Religion and Ethics;* Vol.I, o.p.; cit., pp.122-26.
5. Miss Kingsley, "*Travels in West Africa*", p. 497.
6. Westmark, "*Human Marriage*" 117 ff.
7. Reclus, "*Primitive Folk*" (All are as quoted by *Encyclopaedia of Religion and Ethics*, Vol. I, o.p.cit., p.122-26.
8. Waitz, Anthropologie der Naturvolker, ii, p. 472.

connection was called, stealing a woman.[9] The nature of punishment for adultery meted out among different races also suggests how abhorrent the offence was deemed to be. Among the Wotjobaluk of Victoria, both the woman and her lover are killed; among the Yarkla-mining of South Australia, the woman was branded with a fire stick for the first offence, speared in the leg for the second, and killed for the third; while in New Guinea, adultery is capitally punished.[10] With the Melanesian tribes, the woman was brutally treated, and the paramour was killed by the husband or executed, or the paramour's wife was violated by all the men of the village.[11] Death was the usual punishment in New Zealand.[12] With the Hottentots, the woman was killed or flogged.[13] Killing the guilty wife and frequently her paramour is usual among both Banthu and Negro tribes.[14] Tortures and deaths were meted out to both the parties in Yucatau,[15] and in Mexico, the woman had her nose and ears cut off and was stoned to death.[16] In Nicaragua, she could be divorced for nothing but adultery. Woman and paramour might be killed by the husband among many of the native tribes of India.[17] In Japan the law permitted the husband to kill the woman and the paramour.[18] While in China this punishment of death is permitted if it is meted out on the spot.[19] There existed a sort of distinction according to the value of the woman. Adultery with a Chief's or King's wife was deemed a graver offence and meted out with much graver punishment. For example in Peru, where death was the ordinary

9. Cab. Exped. to Torres Strait, p. 275.
10. Waitz-Gerland, *Anthropology der Naturvolker*, vi, p.661.
11. De Rochas, Novu, caled, p. 262, BSAP, ser.iii, vol. viii, p.361.
12. Voyage of the Astrolabe, p.360.
13. Alexander, Exped. into Interior of Africa i-98zvk, 1902, 334.
14. Kafirs M'Lean, Kafir Laws, 111.
15. Bancroft, ii 674.
16. Heerera, W. Indies iv, 338, Prescott, Peru, 21. (All are as quoted by *Encyclopaedia of Religion and Ethics*, o.p.cit, p. 122-26).
17. Dalton, *Ethics of Bengal* 45, M'Pherson, *Menor of Service in India*, 83.
18. Letourneau, 217.
19. Llbaster, Chinese Criminal Law, 187, 251.

punishment, adultery with the Inca's wife resulted in the burning of the guilty man, the death of his parents and the destruction of his property.[20] Among the Tartars, the punishment for adultery with the wife of a Prince was both of the man's relatives as well as the adulterer.

**Act of impurity :**

Adultery was known by savages as an act of impurity too. They did believe that there are occasions when it is magically dangerous, that certain penalties will befall the transgressor either automatically or by the act of higher powers. Among some of the races - Australians and Andamanis - adultery was held to be a grave moral offence and obnoxious to their high God and would be punished by him.[21] With the Fuegions adultery and lewdness are condemned as an evil.[22] In ancient Mexico, it is said to have been a maxim that "he who looks too curiously on a woman commits adultery with his eyes".[23] There were cases where savages did believe that in the future life retributive justice will follow, among other evil deeds, for adultery too. Among the Greek and Indians, the sin of violation of marriage law involved the idea of incipient ethical impurity, and as such, obnoxious to higher powers. It should be noted that the appreciation of the chastity of unmarried woman entertained by many savages, while connected with the idea that they are the property of their guardians or prospective husbands, may also be due to respect for sexual taboo. With some people, unchastity is considered absolutely disgraceful, and both parties are punished; while in Loango it is held to bring ruin on the country, and with some of the Sea Dyaks it is believed to be offensive to the higher powers.[24]

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20. Letournea, Vol. of Marriage, 215.
21. Man, JAI xiii, 450, 459, Howitt JAI xiii, 156, 157 Native Tribes 500.
22. Westermarck, 58. (All are as quoted by *Encyclopaedia of Religion and Ethics* o.p.cit., p. 122-26).
23. Sahagun, His. gen de las coasas de Neva Espagns, ii, 147.
24. Pinkerton, xvi, 568.

**(2) Among the Egyptians :**

Adultery was looked upon as a sin in ancient Egypt. The didactic papyri warns against adultery as well as fornication. Ptahhotep says, "if thou desirests to prolong friendship in a house which thou enterest as master, as colleague, or as friend, or wheresoever, thou entereth, avoid approaching the woman; no place prospereth where that is done.[25] The story of Ubaaner turns on the infidelity of his wife with a peasant who is eventually handed over to magic, crocodile to devour; the woman being taken to the north-side of the palace (a place of public assembly) and burned and her ashes cast into the river.[26] In the new Kingdom story of the two brothers, Bito, the younger brother is solicited by the wife of the elder brother Anup but Bito reproves her with the words "thou art as a mother unto me, and thy husband as a father". Anup, when convinced of her guilt slew her and cast her to dogs. What the legal penalty for adultery in real life was, or by whom it was exacted, is, however, not known. The marriage contract, however, laid down that in case of divorce on adultery, the husband had no obligation whatsoever, towards the wife. In the marriage contracts of Ptolemaic date written in Greek, adultery and all forms of conjugal infidelity are forbidden to both husband and wife.[27]

**(3) Among the Greeks :**

In Athens, adultery on the part of the wife implied criminal intercourse with any man other than her husband and on the part of the husband, it was similarly a criminal intercourse with the mother, sister or wife of a fellow-citizen and with his concubine, if she were a native Athenian.[28] If the husband caught the offender *flagrante delicto*, he might kill him at once.[29] If the offender

25. Prisse Pap.7-12, Gunn, Instruction of Ptahhtep, p.49. (All are as quoted by *Encyclopaedia of Religion and Ethics* o.p.cit., p. 126-27).
26. Erman, Pap. Westcar, p.1.ff; Petrie, Tales i.p.97 Maspero, Contes Pop. p.24.
27. Grenfell and Hunt, Tebtunis Papyri, I.449.
28. Dam Aristocr. p.637, 53.
29. *Ibid.*, p.53.

escaped or had not been taken in the act, the husband, or in the case of maidens and widows, the guardian, could bring an action for adultery before the Thesmothetae. The punishment was perhaps disfranchisement, either total or partial. If misconduct of the woman was proved, the husband was required to repudiate his wife. She was excluded from public temples. That every where adultery was regarded as a grave crime is clear from Xen Hiero, iii, 3, where it is stated that many cities allowed the adulterer to be killed with impunity. Zaleucus, the Locrian Legislator, ordained the punishment of blinding at Cyme and in Pisidia the adulteress was paraded on an ass[30], and at various other cities, *e.g.*, Lepreon, Gortyn, and Tenedos, the offenders were either fined, pilloried or disfranchised.

**(4) Among the Romans :**

(i) **Under the Republic** :—The word **'adulterium'** is a noun derivate of adulterare, which is probably **'ad alterum'** (se convertere), an offence on the part of the wife being sexual intercourse with any man other than her lawful husband. On the part of the husband it has a narrow meaning and is confined to misconduct with married women, misconduct with other than married women being designated by the general term **'stuprum'**. The feeling of public morals and decency in the early Romans was so delicate that it is said, once a member of the Roman Senate kissed his wife in the presence of his daughter, whereupon he was charged for contempt of national character and a censure motion was passed against him by the Senate.[31] Originally, the offence was dealt with not by the State (except in cases where it passed all bounds, and became, like open immorality, a matter for the police jurisdiction of the censors and aediles), but by the **iudicium domesticum,** or family council, in which near relatives took part, with the head of the family as President in virtue of his patria potestas. This council could inflict whatever punishment it chose.[32] If a wife was divorced on the ground of adultery, it was left to a civil court

30. Plut. Quaest. Gr. 2; Stob. Anth.xliv, 41. (All are as quoted by *Encyclopaedia of Religion and Ethics*, o.p.cit., p. 128).
31. As cited by Abul A'la Maududi, *Pardha*, 1970, Delhi, p.15.
32. Dionys. ii. 25; Suet. Tib.35 Cf Plin HN xiv 13 ff.

to decide what part of her dowry she should retain. Such a trial was termed a **iudicum de morbibus**. The procedure followed is not accurately known, and cannot be recovered with any certainty from the evidence or later lawyers, who are our only authorities.

(ii) **Under the Empire** :—The **lex julia** - By the end of the Republic, owing other causes, to the absence of effective legislation, immorality became so rife at Rome that the Government became alarmed at the prospect of a shrinkage in the population of Italy. In consequence of this, Augustus in 736/18 carried through the measures known (though the title is doubtful) as the **lex Julia de adulteris coercondis.**[33] This, as it opening clause shows, (**'ne quis postha stuprum adulteriuve facito sciens dolo malo**) was directed against immorality in general as well as against adultery. For the first time through this legislation, Roman law recognised adultery, as an act done in contravention of the law of the State, and allowed others than the father or husband of the adulteress to prosecute. For this purpose, a new Court (quaestio perpetua) was established.[34] The fragments of the law that survive will be found in Bruns, Fontes Juris Antiqui. Adultery on the part of the wife or concubine was declared punishable by the law, while marital misconduct was taken to include offences knowing **dolo malo**, committed against any **matrona honesta** as well as against a married woman (**mater familias**). It could be noticed that the **concubinatus**, or inferior marriage, though of great antiquity, was now for the first time recognised as a permanent legal relationship, doubtless, in order to prevent such connection from being penalised under the clauses against stuprum. The law fined the adulteress in one-half of her dowry and one-third of her property. The adulterer lost the half of his property. Both were interdicted by fire and water, a punishment soon replaced by exile or deportation to an island. Death penalty was sanctioned by the original terms of the **Lex Julia**[35]. Conviction entailed

33. Hon Cariv 5. 21-24; Suet. Aug.34. (All are as quoted by *Encyclopaedia of Religion and Ethics,* o.p.cit., p. 134-35).
34. Dio liv 30.
35. Paul sent.ii, 26,14.

**infamia**[36] and the condemned became incapable of giving evidence.[37] The dissolution of the marriage was a necessary preliminary to any action taken against the wife or her paramour, and if her husband did not divorce his wife, he rendered himself liable to the charge of procuration (**lenocinium**). A father who surprised his daughter in **ipsa turpitudine** might kill her and her paramour, if he did so in continent, which was held to mean almost by one and the same blow.

The **lex Julia** formed the basis of all subsequent legislation against adultery. It was not seriously modified, till Constantine, under the influence of Christian idea, introduced the penalty of death for the adulterer, and once more confined the right of prosecution to the near relatives of the adulteress. The death penalty was maintained during the reigns of succeeding emperors. It was confirmed by Justinian[38], who imposed on the adulteress the penalty of life-long imprisonment in a nunnery, unless the offended husband cared to reclaim her within two years.

**(5) Among the Parsis :**

The ancient Iranians attached much importance to marriage and hence they looked upon adultery with horror. In the **Gatha Ushtavaiti**[39] there is a carefully worded warning against what Mill calls "solicitations to vice etc."[40] the female, Yazata Ashi inveighs bitterly against this vice.[41] She says that 'it is the worst deed that men and tyrants do'[42] when they seduce maiden from the path of virtue. In some parts of the Avesta and in the Pahlavi books adultery is personified as **Jahi** (Adultery). The **Yazata Haoma** is entreated to withstand the evil influence of vicious women whose lustful,

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36. Dig iii, 2,2,3.
37. Intestabiles, Dig xxii, 5, 14, 18. (All are as quoted by *Encyclopaedia of Religion and Ethics* o.p.cit., p. 134-35).
38. Inst. iv. 18.4.
39. Yasna, Liii, 7.
40. SBE xxxi, 189.
41. Yasht, xvii, 57-60.
42. Ib xxiii, 281.

(All are as quoted by *Encyclopaedia of Religion and Ethics* o.p.cit., p. 133-34).

wavering mind is like a cloud which changes the direction of its motion according to the direction of the wind.[43] The **Amesha spenta Asha vahishta** (Best Righteousness) is similarly appealed to an adulterer or adulteress[44] (as it were, an opponent of Gao, the good spirit of the earth or the animal creation, the idea being that such a person comes in the way of the progress of the world.[45] The progress of the world in the different spheres of activity, physical and mental, acts against these evil-doers.[46] **Eredat Fedri** is the name of a good, pious maiden who is considered as a prototype of maidenly virtue, and whose guardian spirit is invoked to withstand the evil machination of **Jahi,** the personification of adultery.[47]

In the **Pahlavi Bundahsik**[48] this **Jahi**[49] is said to be an accomplice of **Ahriman** himself. Her work is 'to cause that conflict in the world, the distress and injury from which will become those of **Auhurmazd** and the archangles.[50] In the **Pahlavi Datistan-i-Denig** (71st question)[51] adultery is spoken of as one of the heinous sins. The mother of **Zohak** is said to be the first woman in the world who committed this offence. It is described as a sin which disturbs all lineage, which puts an end to all self-control, and to the legitimate authority of a husband. It is more heinous than theft or spoliation.[52]

The sin of adultery was too heinous to be fully atoned for. But what little atonement could be made for it was directed to be done by the following good acts[53] :

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43. Yasna, ix, 32.
44. Yasht, iii, 9.
45. Vendidad, xxi, 1.
46. Ib xxi, 17.
47. Yasht, xiii, 142.
48. ch.iii.
49. Pahlavi Jeh.
50. Ib v.p.15.
51. Ib Vol. xviii, ch.lxxii, 5.
52. Ib ch. lxxviii 3.
53. Datistan-i-Denig, lxxviii, 18-19.

(All are as quoted by *Encyclopaedia of Religion and Ethics,* o.p.cit., p. 133-34).

(a) the guilty person, especially the adulterer, must help *i.e.*, by money or otherwise, in bringing the marriage of four poor couples;

(b) he must assist with money, poor children who are not cared for by others and bring them up decently and educate them;

(c) If he sees others in society leading a vicious life, he must do his best to retrieve them;

(d) he must perform certain religious rites like those of the Dvazhdah-Homast.

In the **Viraf-Namak** the adulterer is represented as punished by being thrown into a steaming brazen caldron[54], the adulteress as gashing her own bosom and breasts.[55] The adulteress who brings about abortion meets with worse punishment[56]. In all cases of adultery, the **vendidad**[57] requires that a person seducing a woman, whether married or unmarried shall maintain her and the children that may be born of her until they come of age. Any attempt at abortion was considered a great sin.[58]

### (6) Among Hindus :

In the ancient Hindu culture, high value was set upon the wife who proves true to her husband (**pativarta**) and that the law threatened adultery with severe punishment. It was sufficient to charge a woman with fornication if she remained alone with a man for the duration for which an egg is roasted.[59] A censure upon the transgression of marriage vow is to be found in the Rigveda, which speaks of a woman who betrays her husband (**Patiripah**) thus :

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54. Ch.lx.
55. Ch.lxii, Hoshangji and Haung, Viraf Namak, pp.186, 187. (All are as quoted by *Encyclopaedia of Religion and Ethics*, o.p.cit., p. 133-34).
56. Ch. lxiv.
57. xv 18.
58. Vend xv 11.14.

(All are as quoted by *Encyclopaedia of Religion and Ethics*, o.p.cit.)

59. Arab Civilization - Gustawly Bon. p.374.

"Evil-doers...who walk in evil ways like women who betray their husbands, shall be consumed by **Agni**". It is also noticed that the condemnation of adultery in the Smritis is essentially from the standpoint of caste distinction. "Whatever woman betrays her husband (deceives him by intercourse with another man), proud of her beauty and her decent, the king shall cause her to be torn into pieces by dogs in an open place. The paramour shall be roasted on an iron bed; brushwood shall mean throw (upon the fire), there shall be evil-doer be consumed".[60] But the punishments in Manu are similarly graded according to the caste to which the offenders belong. The woman misused by a man belonging to an equal caste shall be allowed to eat only sufficient to sustain life; the woman misused by a man of a higher caste shall have her head shaved. A Brahmin for intercourse with a Vaisya woman, a Kshatriya, for intercourse with a woman of a lower caste, a Kshatriya or a Vaisya for the first offence of intercourse with a Sudra woman, shall be fined. And if a Sudra is guilty of adultery with the woman of a higher caste, he is punished with the confiscation of property and the cutting off, of his organ and if the woman were to be a guarded one, the penalty may even be death. Similar punishment of death in case of a guarded Brahmin woman was laid down for Vaisyas or Kshatriyas, otherwise the punishments meted were heavy fines, imprisonment, shaving of the head and watering of the head with urine.[61]

According to the traditional accounts of the indigenous customary law of Ceylon, open punishment for adultery was usual only where the wives of the King were involved. In other cases, the husband was at liberty if he had caught the seducer in the act, to beat, wound or even kill him.[62] The legal principles also which are in force in Burma, and which are traceable to Hindu law but little modified by Buddhism, do not, in general, recognise the severe penalties threatened in the Brahmin law books. Members of the lower castes guilty of adultery with a Brahmin woman are to be

60. Manu, viii, 371·f. (As quoted by *Encyclopaedia of Religion and Ethics* o.p.cit.)
61. Manu, vii, 374, 378.
62. Niti Mighanduva, Intro.p.xxix f.

punished with 100 blows of stick.[63] In Nepal the aggrieved husband has the right openly to cut down the seducer when found guilty and a wife whom infidelity has betrayed into guilt, is deprived of nose and ears. And according to the Madras Census Report for 1891 and Census Report of the North West Provinces and Oudh for 1901, lower as well as higher castes permit divorce of the wife for unchastity though the instances have been rare.

We however find that the Hindu customs and traditions did allow licence to a woman for the sake of progeny. The Rigveda regards the begetting of a son of the body as indispensable for the preservation of the race.[64]

The attitude of Hinduism towards chastity has varied considerably from age to age and from place to place. And this impression gains strength from the various forms of marriage as obtaining in the old Hindu society. R.N. Sarkar in his book "**Hindu Law**" enumerates the forms of marital tie as acknowledged by the Hindu society.[65] The Hindu sages divided marriages into eight kinds for the purpose of distinguishing those that are approved on account of there being no improper motive on the part of any person concerned in them, and are, therefore, declared to be religious from those that are condemned on some ground or other and are, therefore disapproved and pronounced to be irreligious.

**(a) Approved forms of Marriages :**

(i) BRAHMA :—In the marriage called Brahma, the father or other guardian of the bride has to make a gift of the damsel adorned with dress and ornaments to a bachelor versed in the Brahma or Veda, and of good character, who is to be sought out and invited by the guardian, to accept the bride offered to him. It has been observed by the Allahabad High Court, that it

63. Manu, Kyav. iv, 30.
64. Rigv iii, 1, 23, iii, 4, 7, 7.
65. R.N. Sarkar, *a Treatise on Hindu Law*, Calcutta 1933, p.122-125.

cannot be contended that a widow can never remarry in the Brahma form.[66]

(ii) DAIVA :—In the Daiva marriage the damsel is given to a person who officiates as a priest in a sacrifice performed by the father, in lieu of the Dakshina or free due to the priest, it is inferior to the Brahma because the father derives a benefit which being a spiritual one is not deemed reprehensible.

(iii) ARSHA :—Still inferior is the Arsha marriage in which the bridegroom makes a present of a pair of kine to the bride's father, which is accepted for religious purpose only, otherwise the marriage must be called A'sura as described below.

(iv) PRAJA PATYA :—Another kind of approved marriage is called Prajapatya which does not materially differ from the Brahma, but in which the bridegroom appear to be the suitor for marriage and he may not be bachelor, and in which the gift is made with the condition that "you two be partners for performing secular and religious duties".

These are the four kinds of marriage, the male issue of which confers special spiritual benefit on the ancestors.

**(b) Disapproved forms of Marriages :**

(i) GANDHARVA :—The Gandharva marriage, which is not disapproved by some sages, appears to be the union of a man and a woman by their mutual desire, and to be effected by consummation; this seems to be inconsistent with the father's patria potestas over the damsel, and it appears to relate either to cases where a damsel had no guardian, or to cases where consummation by mutual desire had already taken place, and the law requires that the father should give his assent to the daughter's marriage with the man. Gandharva form of marriage has been held nothing more or less than concubinage and has become obsolete.[67] But instances

66. *Kishen v. Sheo,* 23 ALJ 981 C.358; 1926 AI.
67. *Bhaoni v. Maharaj,* 3 A.738 and also *Viswanathaswamy v. Kamu,* 24 MLJ 271 : 21 IC 724.

of such marriage are to be found in some places where it has been held that some nuptial ceremonies are necessary in such marriages.[68]

(ii) A'SURA :—The A'sura marriage amounted to a sale of the daughter.[69] The **Sulka** or the bride's price was the moving consideration for the gift by the father, of the daughter in marriage.[70] A substantial contribution towards the expenses of a marriage by the party of bridegroom is equivalent to paying consideration of marriage to the bride and the marriage becomes one under the A'sura form.[71] The fact that the rites prescribed for the Brahma form are gone through cannot take it out of the category of A'sura form if there was pecuniary benefit to the giver of the girl.[69] The payment of **parisam** (or parisupanam) presents such as jewels paid by the bridegroom to the bride before he proceeds to the house for marriage at the time of marriage[72] or marriage by exchange *i.e.*, where a girl from one family is married to a boy of another family or *vice-versa*,[73] does not necessarily render the marriage one in the A'sura form.

(iii) RAKSHASA :—The Rakshasa was by forcible capture and was allowed only to Kshatriyas or military classes. Among certain classes of the Gonds of Berar and Batul, this form of marriage is prevalent.[74]

(iv) PAISACHA :—The Paisacha marriage was the most reprehensible, as being marriage of a girl by a man who had committed the crime of ravishing her either when asleep or when made drunk by administering intoxicating drug. It must not be thought that it is an instance in which fraud is legalised by Hindu law; the real explanation appears to be that chastity and single

68. *Brindavana v. Radha*, 12 M 72.
69. *Chunilal v. Surajram*, 33 B. 433, 437, 438 : II Bom. LR 708.
70. *Govind v. Savitri*, 43 B 173.
71. *Samu Asari v. Anachi*, 49 MLJ 554, 22LW 462, 1925 Mad. 37.
72. *Gabrielnatha Swami v. Vialiammi*, 53 IC 423; 26 MLT 348, 1920.
73. *Punjabrao v. Atmaram*, 87 IC 1018, 1926 N. 124.
74. *Gorali v. Emperor*, 1927 N 279.

husbandness were valued most, and so the Hindu law provided that the ravisher should marry the deflowered damsel. It appears, therefore, that the Gandharva and the Paisacha marriages were preceded and caused by sexual intercourse in the first case with the consent of the girl and the second by fraud. The A'sura and the Gandharva seem to resemble respectively the co-emptio and the **Usus** in Roman law which, however, positively forbade the Paisacha marriage.

A number of ancient legends preserve details of a polygamous and promiscuous society in the Vedic age. Such are the tales of Satyakama of Draupadi and Kunti. The beautiful Sarmishtha observed that there was no difference between one's own husband and the husband of a friend.[75] The sage Dirghatamas son of Utathya encouraged his wife's promiscuity and lived on her earnings. From the story of Uddalaka we learn that he explained to his son Svetaketu that the sharing of woman in common was an ancient custom and there was nothing wrong with it. In another context, however, Uddalaka insists that a wife should not have secret lovers, and if there was such a lover, the husband was advised to prepare a sacrifice and pronounce the following curse, against the secret lover, "You have put a libation in my fire, therefore do I take your in-breath and your out-breath, your sons, and your chattles".

The Mahabharata relates that Pandu precluded by a curse from having sexual connection with his wife, tells her to seek another man for the sake of progeny. He explains to her, "formerly women were not bound in fidelity to their husbands, and they could go about enjoying themselves as they wished and were not considered sinful. This was the practice from ancient time and received the sanction of illustrious Rishis fully acquainted with the rules of morality.[76]

The frequent references to woman having a "**Jara**" or paramour would confirm the view that illicit love was by no means

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75. Altekar A.S. *the Position of Woman in Hindu Civilization*, 2nd Ed., Banaras, 1956, p.30.
76. Benjamin Walker, *an Encyclopaedic Hinduism*, Vol. 1, London., George Allen and Unwin Ltd. Ruskin House, Museum Street, 1968, p.3.

unusual.[77] The birth of illegitimate children and their disposal by various means are mentioned in Vedic hymns.[78] Further proof of the tolerant attitude to free love is found in detail of a soma ritual called **Varuna-praghasa**, performed at the beginning of the rainy season, in which the wife of the sacrificer is questioned about her love affairs and her lovers. Keith alludes to a vedic rite that is to be performed "when a man desires his wife to have lovers in plenty during his absence from her side".[79]

The Mahabharatha states that the woman of Mahishmati had the privilege of free sexual relations with any one they pleased without restriction.[79] In a Rigvedic hymn known as the gambler's lament, the gambler's wife is referred to as the object of other men's embraces. The wives of bards, actors, musicians and certain other profession were popularly regarded as being available for all who were able to pay for their services.

In the Mauryan age, Kautilya's Arthashastra permitted wives to contact temporary unions in the event of prolonged absence of the husband. In an earlier age, Krishna, we are told, was particularly well disposed to women who left their husband to come to him.[80] In certain Tantrik sects married women could be used by the other members of the ritual group if the lot fell to them. It may be said that a form of legalised adultery was inherent in the age old custom of **Niyoga** (Levirate) which allowed sexual intercourse of a wife or widow with her male relations, with priests and even outsiders for the sake of progeny with the consent of the husband or close relatives. If a woman refuses to Niyoga, according to Mahabharata, she is a sinful woman. It is also seen in the custom that prevailed in certain parts of ancient and medieval India which gave Kings the right to enjoy the wife's and daughter's of their subjects.

Muladeva, the authority on Kamashastra, wrote a complete treatise on the art of stealing other men's wives; while the Kamasutra

77. Sarkar, S.C., *Some Aspects of the Earliest Social History of India*, London, 1928, p. 85.
78. Madhavananda Swami, *Great Women of India*, Almora, 1953, p.10.
79. Benjamin Walker, *An Encyclopaedic Hinduism*, Vol.1 o.p.cit. p.3.
80. *Ibid.*, p.4.

of Vatsyayana similarly devotes an entire section to the technique of seducing married women. Babhravya, Vatsyayanas predecessor, held that a women's chastity should be respected until she was known to be intimate with five lovers (not counting her husband). Infact some schools like Yajnavalkya held that the transgression of the married women unless it bore fruit, was washed away by the next menstrual flow.

A surprising form of adultery occurs in the Gurukula educational system. Normally the Guru or preceptor was regarded as the pupil's father, and the guru's wife as the chela's mother and dire penalties were imposed for one pollution of the Guru's bed by the chela. Sarkar, however, states that the "Brahmin disciple indeed was often regarded by the preceptor's wife as being in the status of her husband."[81] The story of Uttankas cohabitation with his Guru's wife (while the Guru was away) so as not to waste her **ritu** (Menstruation), suggests that this relationship between pupil and preceptor's wife was allowed to be carried to the stage of intimacy.

According to Manu and Narada if a man has sexual pleasure with an unmarried woman it is not an offence. As Manu says, he who violates an unwilling maiden shall instantly suffer corporal punishment; but a man who enjoys a willing maiden shall not suffer corporal punishment, if (his caste be the same as her's).[82] But if a man of low caste makes love to a maiden of the highest caste, he shall suffer corporal punishment, he who adulteresses a maiden of equal caste shall pay a nuptial fees, if her father desires it.[83] According to Narada if a man has intercourse with an unmarried woman who consents to it, it is no offence, but he shall deck her with ornaments, worship her, and thus bring her to his house as bride.[84]

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81. Sarkar, S.C., *Some Aspects of the Earliest Social History of India*, London, 1928, p. 85.
82. Manu viii 364 (SBEV XXV, p. 317)
83. Manu viii 366 (SBEV XXV p. 318)
84. Narada xii Dr. Jolly - *Naradaiya Dharmashtra*, p.88.

**(7) Among the Buddhists :**

The Buddhists ethics also reveal abhorrence of unchastity. The last of the five precepts binding on a Buddhist layman is not to act wrongly in respect of fleshy lusts.[85] In a very ancient paraphrase of these precepts, this one is expressed as follows :[86]

"Let the wise man avoid unchastity as if it were a pit of live coals. Should he be unable to be celibate, let him not offend with regard to the wife of another". In the Buddhist Canon law an adulterer taken in the act might be wounded or slain on the spot. Adultery was also an offence against the State, and an offender could be arrested by the Police and brought up for trial and judgment.[87] Nothing, however, is to be found in the Buddhist law books of any punishment to be inflicted either by the husband or by the State, on the adulteress.

**(8) Among the Jews :**

The records of Jewish life give evidence of remarkable purity in marital relationship.[88] The sanctity of marriage was upheld as the essential condition for social happiness and virtue. The moral abhorrence felt against the crime of adultery is shown in many Rabbinical utterances. Deuteronomy xxiii 18 (AV17) says "There shall be no harlot (**Kedeshah**) of the daughter of Israel" Yad (Ishnut, i, 4) says that the text intends to forbid any sexual intercourse between a man and a woman not his wife, Maimonides himself holds that as a matter of Mosaic law, both the parties are liable to stripes. The Shulhan 'Aruk (Eben ha ezer 26) holds that both a woman who gives herself over only to one man (pillegesh) and a wife without the ceremony of betrothal and with joincture, are forbidden in the interest of modesty, by custom and Rabbinical law. It is ever forbidden to be alone with a woman in a room.[89] Even lustful was

85. Anguttara, 3, 212.
86. Sutta Nipata, 393, 398.
87. *Commentary on Dhammapade*, 300.
88. Cf. Abraham, *Jewish Life in the Middle Ages*, 1896 f.
89. Iben ha Ezer 22, 2.

condemned as a moral offence.[90] Sota 46 states that not all a man's virtues would save him from Gehenna (Hell) if he committed adultery. In the year 135 A.D. at the crisis of the disastrous revolt against Hadrian, a meeting was held at Lydda. The meeting was attended by several famous rabbis including Akiba and the question was discussed as to the extent of conformity with Roman demand which might justifiably be met rather than face the alternative of death. It was decided that every Jew must surrender his life rather than commit any of the three offences, idolatry, murder or gillui arayoth. This latter phrase includes both adultery and incest.[91]

The Jewish religious Code of conduct called the 'Decalogue' (Ten Commandments) contains a commandment which aims at personal purity enjoining the individual not to commit adultery. It says : Thou shalt not commit adultery.[92] This commandment is rooted in the belief that God is Holy and all who worship him must be holy. Sexual immorality is considered an offence against the purity and holiness of God. For example, when Joseph, the eleventh son of Jacob, living in exile in Egypt had to resist the temptations and overtures of lust for the reason that yielding to them was considered a sin against God. He said, '.....how then can I do this great wickedness, and sin against God?'[93]

The punishment for adultery was varied at different periods in Jewish life. Stoning the adulterer to death was not prescribed except where a betrothed virgin had intercourse with a man other than her fianced husband. Later the punishment for adultery was modified. The woman guilty of adultery was divorced and she lost all her rights under marriage settlement. The adulterer if a man was scourged. Deuteronomy (22:13-30) contains certain laws concerning sexual matters. Verses 13-21 relate to unfaithfulness in a bride. If a husband brings a charge against his wife, which is proved to be false, then he is to be whipped, fined, and must never

90. Ibid 21, cf, mt 5.
91. Graetz, *Hist. of Jews* in English tr ii ch xvi.
92. Exodus 20:14.
93. Genesis 39:9.

divorce his wife. If the bride is guilty, she is to be stoned to death, "because she has wrought folly in Israel by playing a harlot in her father's house....."[94] To prove her innocence, her parents had to produce the token of virginity, *i.e.*, the blood-stained garments - white bed-sheet used on the night when the new couple have intercourse - Verse 23 provides that adultery must be punished by the death of the parties. Verses 23-29 legislate for seduction : first of a betrothed maiden with her consent an offence punishable by the death of both parties; secondly of a betrothed maiden against her will, then the man dies; and thirdly, of an unbetrothed maiden, in which case the man must pay a dowry to the girl's father, marry the girl and never divorce her. These laws may be summarised as follows :

> The wife's obligation to her husband, of course, included strict chastity. Adultery incurred the death of both the man and the woman. A wife suspected of premarital unchastity was stoned if her father could not produce her 'token of virginity'. Since the decisive point in making the marriage contract was the betrothal, violation of a betrothed virgin was treated as adultery, though it took place where no rescue was possible, only the man was put to death.....Seduction or rape of an unbetrothed virgin obligated the guilty man to marry her and give her father the customary **mohar**; the father might, however, refuse to let him have her and still exact the equivalent of the **mohar.**[95]

## (9) Among the Semites :

The treatment of infidelity among the Semites can be illustrated by a great variety of evidence, extending from the codified legislation of Hammurabi, King of Babylonia (c. 2250) to the unwritten, though no less authoritative, tribal laws of the present day.

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94. Deuteronomy 22:21.
95. Thomas Nelson *'Peake's Commentary on the Bible'* London 1962, p. 135.

Mere suspicion of adultery is not enough, and terrible consequences may result from unsupported denunciation. Hebrew law required two witnesses, and (by an extension of thetalio) the false accuser would bring upon himself the punishment, would have entailed upon another. It is noteworthy that the law in Dt. 22 specifically provides that the guilty ones' are 'found' in the act. The law in question belongs to a group which reflects that stage where moral ideas have become so advanced that the husband attaches importance to the chastity of his newly married wife (the restriction of Lv 21 apply only to the priests). The procedure (Dt. 22) as detailed states that if the accusation of impurity brought against the bride is true, she is stoned to death by the men of the city; if false, the man must pay a hundred shekels to the father, and is not permitted to divorce his wife[96]. It is intelligible that, in the former event the girl is treated as an adulteress, since from the time that she was betrothed she is regarded *de facto* as married woman. The same code in its treatment of betrothed women makes a noteworthy distinction in the scene of the offence. Should it be committed in the city, both are stoned; whereas, if it be in the open country, the woman goes free since it is assumed that she cried for help and found no protector (v.v. 23, 27).

The Babylonian Code of Hamurabi implies a more advanced state of culture than the oldest Hebrew. The position of the married woman was secured by a contract which could specify the penalty for her infidelity and possibly vouched for her purity at the time of marriage. The following laws require notice - The man who is caught ravishing a betrothed virgin, who is living in her father's house is put to death, whilst she herself goes free. If she was betrothed to his own son, a distinction is drawn dependent upon whether the marriage had or had not been consummated. In the latter event, the man must pay half a mina of silver and give her personal property, and she is free to marry whom she will. In the former event, the man is strangled[96]. Drowning was the ordinary legal penalty although according to a somewhat obscure law, the man

96. Scheil, Winckler, Harper etc. see: SA Cook Laws of Moses etc, 1903, 100 f.

might pardon his wife and the King, the adulterer, at their will. The Babylonian procedure in cases where absolute proof was not at hand is characteristic. In all ordinary cases the wife could take an oath and swear her innocence, and was allowed to return (or was sent) to her (father's) house; but if the finger had been pointed at her on account of another, and she is obviously the subject of scandal, she must undergo ordeal by water. *Robertson Smith* has cited the Arabian story of Hind bint 'Utba', whose husband sent her back to her father on suspicion of unchastity, and it appears that the case could not rest there, her treatment being clearly regarded as an insult; and from another incident it would seem that suspected wives could be conducted under ignominious circumstances to the Kaba and there swear seventy oaths (Kinship). The ordeal and oath reappear in the antique ordeal preserved in a late source Nu5 where the suspected wife is conducted to the priest, who brings her in humiliating attire before, Jahweh. There the priest charges her by an oath which she accepts with the formula '**Amen**' and prepares a portion of holy water and the dust of the floor of the sanctuary[97] in which have been washed the words of the oath, the procedure which does not prescribe any punishment for unjust accusation, is treated at greater length in the Mishna[98] and is said to have been abolished towards the close of the 1st century A.D.

## (10) Among the Christians :

The Christian view about fornication and adultery goes a step further to the Jewish view and takes account of the inward disposition and the motives that prompt action. The Seventh Commandment in the Decalogue which runs as 'Thou shalt not covet thy neighbour's wife' has of course a deeper meaning to the command, 'Thou shalt not commit adultery', as the former goes behind the outward act and condemns the sinful desire which leads to adultery. But the passage in the Jesus 'Sermon on the Mount' centres on the moral injury to the man himself "If thy right eye caught

97. For Semitic parallels of the Syriac henana and sheyagta and see JQR 1902 p. 431 JRAS 1903, p.595.
98. Sota; cf. also Jos Ant. III xi.6.

thee to stumble, pluck it out and cast it off from thee : for it is profitable for thee that one of thy members (of the body) should perish and not that thy whole body be cast into hell." For Christians, therefore, the Seventh Commandment, before everything else, is a law of chastity and the sin of adultery includes every kind of unlawful sexual indulgence whether in thought or deed.

St. Paul, in his writings in the New Testament deals at length with the 'lusts' of the flesh which was against the soul. He frequently uses the word, 'fornication' for the various sins of the flesh. To his new converts, he writes that :

> They must put away the conduct which was formerly characteristic of their lives (Colossians 3:7-10). They must not act with the passion of lust of heathen who do not know God (I Thessalonians 4:5)

He condemns ungodliness and wickedness of men who indulged in dishonorable passions. The condition was so deplorable that Paul had to write and say :

> Their women exchanged natural relations for unnatural and the men likewise gave unnatural relations with women and were consumed with passion for one another, men committing shameless acts with men and receiving in their own persons the due penalty for their error (Romans 1:26-27).

The canons of the Council of Illiberis (Elvira in Spain) have furnished a regulating principle for the ecclesiastical legislation of succeeding ages. Canon 14, says virgins **socculares**, guilty of fornication should undergo a year's penance and should marry their seducers. According to Canon 72, a widow who commits adultery must undergo a penance of five years, and, if practicable, must marry her seducer. Canon 69 imposes five years' penance for a single act of adultery, while Canon 64 imposes 10 years for adultery persisted in for any length of time and enacts that there must be no restoration to communion so long as the sinner persists in the sinful life.

The Code of Theodoric decreed death for adultery. A married man who seduced a virgin was deprived of a third part of his property as damages. The unmarried seducer was bound to marry his victim and endow her with a fifth share of his estate. In the Burgundian Code, the adulterer was punished with death and the adulteress, if not put to death, was treated as an infamous person. By the Visigothic Code the adulteress and her paramour were given up to the injured husband to be punished with death or otherwise according to his free pleasure, flogging, mutilation and other punishments as were in force among the Danes and Saxons. In England, the death penalty was not formally abolished until the reign of Caunte.[99]

Constantine revived the old capital penalties for adultery which had been obsolete since the days of Angustus Ceaser. His law condemned the adulteress to death, but the penalty might be mitigated to banishment. The paramour was to be beheaded if a freeman, and if a slave burnt to death.[100] Constans decreed against both guilty parties, the panity of parricides *viz.* to be burnt alive or else drowned in a sack.[101] During the period of Emperor Theodosius the punishment was by confinement in the public brothels under circumstances of shameful and disgusting ignominy. But under Justinian, the death penalty was finally abolished and the guilty wife, if not received back by her husband within 2-years, was condemned to be shut up for life in a convent. Nevertheless the sanctity of purity and chastity still prevails as the common English saying goes virginity once lost can never be replaced.

### (11) In Pre-Islamic Arabia :

The Pre-Islamic Arabia presents before us the manner in which man has tried to legalise all those forms of sexual intercourse as would have otherwise been against the well accepted principles

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99. Millman of *Hist. of Latin Christianity* Bk. III ch.v.
100. Code Justin 1 ix, tit.ii.
101. *Ibid* VIL. tit.65.

of chastity. It is narrated ....that there were four kinds of marriage in vogue at the time when the Islamic laws came into force.[102]

(1) That form of marriage which has been approved by Islam too, namely, a man asks another for the hand of the latter's ward or daughter, and then marries her by giving her a dower.

(2) A custom according to which a man would say to his wife: "Send for so and so (naming a famous man) and have intercourse with him." The husband would then keep away from her society until she had conceived by the man indicated but after her pregnancy became apparent, he would return to her. This originated from a desire to secure noble seed.

(3) A number of men, less than ten, used to go to a woman and have sexual connexion with her. If she conceived and was delivered of a child, she would send for them, and they would be all bound to come. When they came and assembled, the woman would address them saying : 'You know what has happened. I have now brought forth a child. O so and so? (would name whomsoever of them she chose), this is your son." The child whomsoever of them she chose), this is your son." The child would then be ascribed to him, and he was not allowed to disclaim its paternity.

(4) A number of men used to visit a woman who would not refuse any visitors. These women were prostitutes and used to fix at the doors of their tents a flag as a sign of their calling. If a woman of this class conceived or brought forth a child, the men that frequented her house would be assembled and physiognomists used to decide to whom the child belonged.[103]

Of the above, the first form of marriage must have been of the latest growth, and apparently it is a mere contradiction in terms to call the rest, examples of forms of marriage.

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102. Abdur Rahim, *Muhammadan Jurisprudence*; o.p.cit., p.7 to 8.

103. *Kashf'l-Ghumma*, Vol. ii, p.56 as quoted by Abdul Rahim *Muhammadan Jurisprudence*, o.p.cit., p.8.

**(A) Arab Polyandry :**

Women used to be purchased and sold for the purpose of sexual pleasure. Unlimited polygamy was common as also polyandry. Polyandrous was the marriage law under which a women receives more than one man as her husband. There was no notion that a man should keep his wife strictly to himself. The custom of polyandry might have been due to the absence of the idea of chastity and fidelity and of all feeling of repugnance to share a wife with others.[104] Man's feeling were not so refined that he would rather give her up altogether than admit a rival. The second reason for polyandry might be the presence of women who were not free to choose their own lovers. The system of polyandrous marriages in ancient Arabia might have existed for the following reasons :

(1) Women, procured by capture or contract, would generally fall in the first instance not into the hand of an individual but into the hands of group of kinsmen.

(2) These kinsmen, who certainly were not restrained from sharing their women by any feeling of delicacy, must often have been in circumstances where the idea of reserving one wife each man would be out of the question.

(3) Another probable condition might be the scarcity of marriageable women on account of the practice of killing female children - that is female infanticide (Tribe of Tamim).

The ancient Arab polyandry like the Tibetan polyandry, was not an unregulated promiscuity but an ordered marriage system - the eldest of the group (called eldest brother or father) being the special guardian of the chastity of the common wife and her companion by might.

Adultery meant intercourse of the common wife with any one else than the kinsfolk or brothers (common husband) and was a criminal offence, punishable with death.

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104. Robertson Smith, *Kinship and Marriage in Pre-Islamic Arabia*, p.124.

Strabo, quotes the following two evidences :

"Brothers have precedence over children; the kinship also and other offices of authority are filled by members of the stock in order of seniority. All the kindred have their property in common, the eldest being lord; all have one wife and it is first come first served, the man who enters to her leaving at the door the stick which it is usual for everyone to carry; but the night she spends with the eldest. Hence all are brothers of all; they have also conjugal intercourse with mothers; an adulterer is punished with death; and adulterer means a man of another stock. A daughter of a certain King who had fifteen brothers, all much in love with her, tried to keep her room to herself by getting sticks like her husbands put at the door. One of the brother's found a stick at the door when he knew that the whole family were in the market place, and suspecting the presence of an adulterer, he runs to the father, who comes up, and it is found that the man has falsely accused his sister."[105]

## (B) Mut'a or Temporary Marriage :

It admits of no doubt that the Arabs used also to contract what has been called a temporary marriage under the name of **mut'a**. It is stated in the Fathu'ul Qadir,[106] when a man came to a village and he had no acquaintance there (to take care of his house), he would marry a woman for as long as he thought he would stay, so that she would be his partner in bed and take care of his house. This peculiar institution, analogous of which are not unknown among Western communities, flourished among the Sabeans and Zoroastrians from early times and seems to have continued in force among those people even after their conversion to Islam in spite of

105. R. Smith *Kinship and Marriage in Pre-Islamic Arabia*, o.p.cit., p.133.
106. *Fathul Qadir*, Vol. iii, p. 151.

the prohibition of the Prophet.[107] The tradition in which Prophet prohibited the Mut'a marriage reports by Ali is as follows :

Ali reported that the Messenger of Allah prohibited temporary marriage of woman on the day of Khaiber, and eating of meat of domesticated asses.[108]

عن علیؓ انّ رسول اللہ صلعم
نھیٰ عن متعۃ النّساء یوم
خیبر وعن اکل لحوم الحمر الا
نسیّۃ ۔ (حدیث)

**(12) After the advent of Islam :**

Islam regarded chastity as a supreme virtue both for men as well as women. Unchastity in any form is made unlawful by the Qur'an :

> Say : My Lord forbiddeth only indecencies such of them as apparent and such as are latent and sin and wrongful oppression.[109]
>
> And those who preserve their chastity[110].....save with their wives and those whom their wives and those whom their right hand possesses, for thus they are not blame-worthy.[111]
>
> Tell the believing men to lower their gaze and be modest, that is purer for them. Lo! Allah is aware of what they do.[112]
>
> And tell the believing women to lower their gaze and be modest and to display of their adornment only that which is apparent and to draw their veils over their bosoms.....[113]

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107. Amir Ali *Mohammadan Law*, Calcutta 1917, 4th Edn., p.452.
108. Fazulul Karim, *Al-Hadis* Book II 1939, p.686 (Agreed xxvii:113) * The siege of Khaiber took place in 7A.H.
109. Qur'an 7:33.
110. Qur'an 70:29.
111. Qur'an 70:30.
112. Qur'an 24:30.
113. Qur'an 24:31.

So much sanctity was attached by the Prophet to chastity that he used to take an undertaking from the women embracing Islam in the following words which are preserved in the Qur'an :

Neither commit adultery nor kill the children nor produce any lie that they have devised between their hands and feet.[114]

ولا یزنین ولا یقتلن اولادھن
ولا یاتین ببھتان یفترینہ
بین ایدیھن وارجلھن۔(قرآن)

Once the Prophet enquired from his companions whether they would guarantee him the safeguard of two things so that he could guarantee them paradise in the Hereafter. Explaining further he said that the two objects requiring strict continence comprise of the private parts and the tongue.

We shall study in detail the concept of chastity in Islam while dealing, in the foregoing pages, the penal laws of Islam with special reference to fornication. It may not be out of place to mention, however, in this connection, that it is the unique feature of Islamic legal system, which not only includes fornication, *per se*, in the arena of 'hudood' but also includes in this category, the false accusation of adultery *viz.*, **Kadhf.** Verse 24:4 of the Qur'an running as hereunder deals with this situation :

And those who accuse honourable women but bring not four witnesses, scourge them (with) 80 stripes and never (afterwards) accept their testimony,[115]

والذین یرمون المحصنٰت
ثم لم یاتوا باربعۃ شھدآء
فاجلدوھم ثمنین جلدۃً
ولا تقبلوا لھم شھادۃً ابدًا۔(قرآن)

which has for its background the false accusation of the Prophet's wife Ayesha (Incident of **Ifk**) in the fourth year of Hijra.

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114. Qur'an 60:12.
115. Qur'an 24:4.

## *Chapter - II*

# PENAL LAWS OF ISLAM WITH SPECIAL REFERENCE TO HUDOOD

The Muslim Legists trace almost all the principles to the Qur'an and the Hadith. They are regarded, in fact, to contain the fundamental prescriptions which regulate the various relations of life; the religious, civil, and criminal laws which provide for the constitution and continuance of the body politic; and even the germs of political rules and social economy.

## I. FEATURES OF ISLAMIC CRIMINAL LAW :

The important features of Islamic Criminal Law are as follows:

1. The entire law is based, as stated above, on religious sanction. It is believed to be divine in conception and promulgation and even the Prophet from whose mouth the law was pronounced did not claim any personal share in its formulation.

2. Qur'an marks that stage in the intellectual development of a people when the idea of crime as distinct from sin was still in the course of evolution. Hence in the conception of personal and social duties and obligations, sin, vice and crime were blended together. Yet their tendency to be separate and distinct from each other could easily be marked.

3. Punishments in Islam do not end in this life. A revisional judgment by God himself is considered as inevitable in the life to come, and reward and punishment, justly awarded, are believed to be in store for all. Secular punishment appear to be very severe and even death penalty has been laid down for some of the offences. Deterrent aspect of punishment is laid special emphasis on.

4. The Jurist is allowed to exercise his reason only when no decision can be cited from the **Qur'an Hadith** and **Ijma**. The opinion of the Jurist is termed as **Qiyas** and this factor has played a predominant part in the development of Islamic criminal law and in keeping it abreast with the changing needs of growing society.

## II. THE THEORY OF HUQUQ-ULLAH AND HUQUQ-UL-IBAD :

Islam regards all men as brothers descending from one common father, Adam. The nature of this brotherhood is grouped round the symbol of faith and is governed by the creator of all, God, Who is the only competent authority to give orders in the nature of law. Man is only an agent or Caliph of God upon the earth. Supreme power can be conferred by God alone, because no man, as such, is entitled to rule over his fellow beings.[1] The rules of such a legal system comprise every aspect of a Muslim's life from the humblest details upto the highest principles of his moral and social existence, and is known as **shariah** "the straight way" and must be, according to Islam, followed by every believer.

Society as indicated above, is a necessary fact; it is not a confused rabble, but an aggregation held together by a common end and by ties of mutual help; hence it gives rise to social and moral conception of state.

The objection of (Islamic) Government is to lead men to prosperity in this world and to salvation in the next.[2] This purpose is effected by law. Thus the science of law, **al-fiqh**, is linked up with theology; and this may be inferred from Hanafi's definition of law. "The science of law is the knowledge of the rights and duties whereby man is enabled to observe right conduct in the world and prepare himself for the future life.[3]

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1. Abu Mohammad Musleh Kan-nallah, *Irtiqa-e-Insan Aur Qur'an*, p.2.
2. Sir Thomas Arnold and Alfred Guillanne - *The Legacy of Islam*, p.304.
3. *Ibid.*, 304-394.

Rights are the media through which law exercises its functions.[4] There are only two divisions of right under the Muslim law : **Huquq-ullah** (rights of God) and **Huquq-ul-ibad** (rights of men). The former corresponds to rights of the public and the latter to private rights.[5] Rights of the former class reside in God, but since they exist for the benefit of the community, they are described as rights of the community or public rights. The punishment of crimes is a right of the community, as distinguished from the right of an individual affected by a wrong, to exact restitution or satisfaction. That is to say, there are some wrongs which affect public order and which the state thinks fit to punish without consulting the wishes of the person wronged, and they come within the purview of public law; other wrongs are regarded as a matter of redress, which it is for the individual wronged to seek and to enforce, and these are the subjects of private law.

## 1. Basis of the theory :

Starting from liberty as the fundamental basis of law, two-fold reasons may be attributed to Huquq-ullah :

(i) Liberty finds its limit in its nature, because liberty unlimited would mean self destruction.

(ii) No limit is arbitrary, because it is determined by its utility or the greatest good of the individual or of the society.

Islam has a tendency towards mysticism, but not towards asceticism. Potentially any man is entitled to any thing because all the goods of the world have been created for the use of man. It exhorts the believer to enjoy the "good things" granted by God, provided he observes due measures and obeys the precepts, not numerous in themselves, nor very strict, of the **Qur'anic** revelation.[6]

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4. Abdul Rahim, *The Principles of Mohammedan Jurisprudence* o.p.cit., p.56.
5. Ibid., p.66.
6. Sir Thomas Arnold and Alfred Guillaunie, *The Legacy of Islam*, o.p.cit., p.289.

**(a)(i) Hadd and its object :**

Liberty, cannot be unlimited. By his very nature, man is greedy and ungrateful, covetous of other man's goods, niggardly of his own, disposed to sloth, ungrateful for the blessings that God has bestowed upon him. Human society would not have been able to subsist, had God allowed free scope to the appetites of every individual as well as to the injustice and violence of all. God has, therefore, set a bond to human activity, and this bond, **hadd**, restrains human action in certain limits, forbidding some acts and enjoining others; and this restraining the primitive liberty of man, so as to take it as beneficial as possible, either to the individual or to the society, is the object of **hadd** in Islam.

**(ii) Forms of Hudood :**

In the sphere of criminal law, there are five limits or **hudood**, (meant to prevent crime and protect the society. They are :

1. **Zina** : Unlawful intercourse,
2. **Kadhf** : Accusation of unlawful intercourse,
3. **Shurb-al-khamr** : Drinking wine,
4. **Sarika** : Theft, and
5. **Kat-al-tarik** : Highway robbery.

Out of these five hudood the two **hudood** *i.e.*, **zina** and **shurb-al-khamr**, and according to some Jurists **sarika**, are regarded purely rights of God and hence they are non-bailable[7]; the state shall initiate proceedings in these cases irrespective of the will of the complainant.

**(b) Tazir :**

All other rights which are not vested in God, are vested in the private individuals. **Tazir** is purely a private right[8] in the general

7. Mir Ahmed Sharif, *Islamic Khanoon-e-Fojdari* translation of *Kitabul-ikhtiar*, o.p.cit., p.192.
8. *Ibid.*, p.1.

interest of the society with a view to maintain law and order. **Tazir** is discretionary punishment, its measure varying from mere warning to transportation as warranted by the nature of crime and circumstances of each individual case.[9] This department of Muslim criminal law answers *Kenny's* notion that crime is the creation of Government policy. State is allowed to declare any act, punishable by **tazir**, but, of course, the measure and nature of **tazir** should not exceed the limits of **hadd**.[10]

**Huquq-ul-ibad** are preferred to **Huquq-ullah** in the sense that priority is given to **tazir (Huq-ul-ibad)** over **hadd (Huq-ullah)**[11]

**(c) Qisas :**

In considering the nature of Muslim Criminal Law, this water-tight division of rights into public and private and the corresponding remedy for their violation as **hadd** and **tazir** will not be conclusive. For certain offences might extend to violations of both, **Huquq-Allah** and **Huquq-ul-ibad.** The remedy for such cases is termed **qisas**, which provides a concurrent scope for these offences. In **qisas**, public right is mixed up with private right, the latter, however, dominating.[12] Hence it is given priority to **hadd**.[13] **Qisas** being the private right, is compoundable and pardonable by the injured person or his heirs.[14]

This division of rights into public and private, and the corresponding remedies for their violation, reminds us of Black-stone's definition of crime, as "a breach and violation of public rights and duties which affect the whole community considered as a community".[15]

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9. Mir Ahmed Sharif, *Islamic Khanoon-e-Fojdari* translation of *Kitabul-ikhtiar*, o.p.cit., p.1.
10. *Ibid.*, p.8.
11. *Ibid.*, p.5.
12. *Ibid.*, p.28.
13. *Ibid.*, p 159.
14. Abdul Qadir Auda, *Islami Khanoon-e-Fojdari*, Art. in *Terjumanul Qur'an.*, Jan-Feb.1954, p.359.
15. Blackstone, *Commentaries on the Laws of England*, III (p.2).

The importance of the theory of **Huquq-Ullah** and **Huquq-ul-ibad** lies in the fact that under Muslim Criminal Law certain rights are regarded as public and their violation is punished in the interest of the society. This idea is at the very root of modern criminal law, though the crimes are not the same as enunciated by Islam.

## III. PUNISHMENT OF HADD AND THE ATTITUDE OF THE MUSLIM JURISTS :

The **hadd** is a right or claim of **Allah**, **Huquq-Ullah**, therefore, no pardon or amicable settlement is possible. Prosecution for false accusation of unlawful intercourse, **kadhf** and for theft, **sarqa**, crimes which include infringing the right of a person, **huq-e-adami**, however, takes place only on the demand of the person concerned, and the applicant must be present both at the trial and at the execution.[16] **Hadd** punishments, as stated above, are, treated as rights of God and hence full precautionary measures will have to be taken while inflicting the **hadd** punishment. On an occasion, the Prophet of Islam said :

> "Remove the creatures of God out of the clutches of Hudood punishments, if there can be any way out for them".[17]

Another tradition runs as under:

> "Ayesha reported that the Messenger of Allah said : Drive off the ordained crimes from the Muslims as far as you can. If there is any place of refuge for him, let him have his way, because the Imam's (leader's) mistake in pardon is better than his mistake in punishment."[18]

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16. Joseph Sachacht. *An Introduction to Islamic Law.*, o.p.cit., p.176.
17. Ibne-Maja (as quoted by Taqi Amini, *Ahkam-e-Sharia mayn Halath vo Zamane ki Revayath*, Delhi, Ed.1970, p. 72.
18. Fazlul Karim, *Al.-Hadis* Book II xxv: 102, Tirmizi, Calcutta 1st Ed.1939, p.544.

In the case of unlawful intercourse, the witnesses play a very important part; if they are not present at the time of execution (and when the punishment is of stoning, if they do not throw the first stone), the punishment is not carried further. The religious character of the **hadd** punishment manifests itself also in the part played by active repentance, **tawba**; "All hudood punishments are expiated by repentance".[19] If the thief returns the stolen objects before an application for prosecution has been made, the **hadd** lapses, repentance from highway robbery before arrest also causes the **hadd** to lapse, and any offence committed is treated as ordinary delict, **jinayat,** so that, if the person entitled to demand retaliation is willing to pardon, blood-money may be paid instead, or the punishment remitted altogether. In the case of offences against religion which are not sanctioned by **hadd**, punishments, the effects of repentance are even more far-reaching. There is a strong tendency to restrict the applicability of **hadd** punishment as much as possible, except the **hadd** for false accusation of unlawful intercourse, but this in its turns, serves to restrict the applicability of the **hadd** for unlawful intercourse itself.

**(1) Narrow definitions :**

The most important means of restricting **hadd** punishment are narrow definitions. This is evident from the practice set by the second **Caliph, Omer Ibn-Alkhattab**, who did not carry out the punishment prescribed for theft (Amputation of hand) during years of famine and journey, doubting that people may be impelled to theft on account of hunger. The following episode throws further light upon this aspect :

> "It was reported to Omer that some boys in the service of Hatib Ibn Abi Balta'a had stolen the she-camel of a man from the tribe of Muznah. When Omer questioned the boys they admitted the theft; so he ordered their hands to be cut. But on second thought he said, "By

19. Moulana Mohd. Taqi Amini, *Ahkam-e-Sharia mayn Halath vo Zamane ki Revayath*, o.p.cit., 1970, p. 77.

> God I would cut their hands if I did not know that you employ these boys and starve them so that they would be permitted to eat that which is prohibited unto them. "Then he addressed their employer saying; "By God, since I have not cut their hands, I am going to penalise you with a fine that shall pain you" and he ordered him to pay double the price of the she-camel."[20]

This episode illustrates a very clear and express principle that punishment will not be inflicted where there are circumstances which impelled the wrong-doer to commit a crime.

Duress is recognised to a wide extent in the case of unlawful intercourse; and of drinking wine, to the extent that it must be proved that the act was voluntary. Only one **hadd** is due for several offences of the same kind that have not yet been punished.[21]

### (2) Limitation of time :

The second means of restricting **hadd** punishment is the short period of limitation. There are two opinions about the period of punishment for drinking wine. The generally accepted period is one month while the other opinion holds the time during which, the smell of wine or drunkenness persists. This does not mean that the offence is not punishable any longer. The **Qadi** does not in such cases accept evidence. If, however, there is a justification for the delay in reporting the offence, such as distance etc., the period of limitation does not run. Finally much importance is laid down with regard to evidence, for instance as regards their number, their qualifications, and the manner of their statements. These demands are most severe with regard to evidence of an unlawful intercourse. In this case four male eye-witnesses are required instead of the normal two, and they must testify as eye witnesses not merely to the act of intercourse but to unlawful intercourse, **zina**, as such; similarly a confession of unlawful intercourse, in order to bring about the **hadd** punishment must be made on four separate occasions

20. Mohd. Qath, *Islam the Misunderstood Religion*, Delhi,1970, p.249.
21. Joseph Schacht : *An Introduction to Islamic Law*, o.p. cit., p. 176.

while in the case of other offences sanctioned by **hadd**, a single confession is sufficient. An unlawful intercourse which is dismissed, constitutes **kadhf,** which itself is punishable by **hadd**; for instance, if one of the four required witnesses turns out to be a slave or to be otherwise disqualified from giving valid evidence, or if there are discrepancies between their respective depositions, or if one of them retracts, **ruju**, his evidence, all are, in principle, liable to the **hadd** for **kadhf**. On a confession of an offence involving a **hadd**, it can be withdrawn, **ruju**; it is even recommended that the **Qadi** should suggest this possibility to the person who has confessed, except in case of false accusation of unlawful intercourse.

### (3) Doctrine of Shubha (irror or doubt) :

The most important means of restricting **hadd** punishments is assigned to **Shubha,**[22] the resemblance of the act which had been committed, to another lawful one, and therefore, subjectively speaking, the presumption of *bona fides* in the accused. This principle of **Shubha**, is supported by the saying of the Prophet :

"Avoid the execution of **hadd** punishment by doubts".[23] ادرؤ الحدود بالشبهات

In the light of the above tradition Omer, the second Caliph said :

"It is better of me to waive off hudood rather than enforce them in the presence of doubts."[24] لان اعطل الحدود بالشبهات احب الى من ان اقيمها بالشبهات

The principle underlying this doctrine is that doubt of any kind would be sufficient to prevent the imposition of **hadd**. For instance, in case of doubt in the woman," there is no whoredom".[25]

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22. Joseph Schacht : *An Introduction to Islamic Law*, o.p. cit., p. 176.
23. Al-Marghinani, *Al-Hidaya,* Kitabul-Hudood-(Margin).
24. Moulana Mohd. Taqi Amini, *Ahkam-e-Sharia mayn Halath vo Zamane ki Revayath*, o.p.cit., 1970, p. 72.
25. Mohammedullah Ibn Jung *The Administration of Justice of Muslim Law,* p.81.

Doubt may arise (i) from the nature of the authority applicable to the facts of a particular case[26] or (ii) from the character of the witness or (iii) from the state of mind of the accused person, that is, his knowledge of the law or facts or (iv) from the state of his will at the time of commission of the offence. We may classify doubts into : (1) **Shubhatul mahal** and (2) **Shubhat-ul-fail.** The former doubts pertain to the application of law. If there is a show of authority, (though not of a second character) against the accepted law, which declares a particular act to be punishable with **hadd,** this is **shubhatul-mahal,** which is sufficient to prevent the imposition of such a sentence, even though the accused did not entertain any doubt on the point : **Shubhatul-fail,** is a doubt with respect to the illegality of the act. If an offender misconceived the law in a case (where there is no foundation for such misconception) and actually believed that what he was doing was not an offence, he will be saved from **hadd.** An interesting comparison between this doctrine of doubt and M'Naughten's Rules may be made.[27] Under English law the accused is protected if it is established that he, at the time of doing the act, either due to drunkenness or insanity, did not know the nature of the act or that the act was wrong or contrary to law. He is, however, not protected if he knew that what he was doing was wrong.

### (4) Abu Hanifa's Theory of Territorial Application of Hadd :

It is one of the basic principles of Islamic Jurisprudence that punishment either of **hadd,** or **qisas** is to be administered only either by the **Caliph** himself or a **Qadi** duly appointed by him. Otherwise punishment of **tazir** will be substituted for **hadd.** According to the author of **Alashban-ul-Nazair,** a celebrated treatise on **Fiqh,** if **hudood** are committed along with **tazir** the latter must be preferred over the former, *i.e.*, offender must be punished by way of **tazir**[28] outside the territorial jurisdiction.

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26. Abdur Rahim, *Mohammaden Jurisprudence*, o.p.cit., p.238-9.
27. *M'Naghten* case (1843) 4 St. Tr. (N.S. 847, 8 ER 1718, quoted by R.C.Nigam, *Law of Crimes in India*, Vol.I Bombay (1965), p.360.
28. Mir Ahmed Sharif, *Kitabul-Ikhtiar*, translated as *Islami Khanoon-e-Fojdari*, o.p.cit., p.28.

In order to restrict the application of **hadd** as far as possible, "Abu Hanifa propounded a theory that religious punishment (punishment prescribed by religion) shall be applied by Imam only to those offences committed within the territorial limits of his country. Any offence of **hadd**, if committed by a person, outside his territorial limits should not be punished as such. For example, if personnel of Muslim army commit **hadd** in the enemy country, they should not be tried under **hadd**. In support of this theory, **Abu Yousuf** and **Shaibani** relate certain traditions from the Prophet.[29]

The **Madinese** reject this theory altogether, **Auzai** considers it natural that **hadd** punishments in army should be administered by military commanders, even those of lower ranks.[30] But **Imam Malik** who adopted a way-in-between, says that the Commander might postpone the **hadd** punishment if he is otherwise, engaged in enemy country.

In India Emperor Aurangzib adopted the policy to avoid **hadd** and gradually modified law of theft as and when demanded by social contingencies. We can gather this from the **Fatawa-e-Alamgiri**, and the **Firman** issued by the Emperor to the Diwan of Gujrat in 1672. Here are some of the instructions : "When theft is rife in the town and the thief is captured, do not even after proof behead him nor impale him as it may be his first offence.....if he repeats the offence then after **tazir** keep him imprisoned till he repents. If he is not cured by **tazir** and imprisonment, but commits theft again, then sentence him to long term imprisonment".[31]

The tendency of growth of Muslim Criminal Law was not to inflict the punishment of **hadd** as far as possible and rather to substitute **tazir** for **hadd.** As said above, **tazir** is a discretionary punishment, whose nature and extent is fixed by the head of the State and which may vary from person to person. The object of **tazir** is the correction of the offender and the prevention of the

29. Joseph Schacht : *The Origin of Mohammadan Jurisprudence*, o.p.cit., p.209.
30. *Ibid.*, 209.
31. J.N. Sarkar, *Mughal Administration*, p.123.

recurrence of the crime, and it is left to the discretion of the Magistrate to determine, in view of the circumstances of each case, the sentence by which the object of the law would best be achieved.[32]

## IV. THEORY OF PUNISHMENT :

It may be appropriate, at this stage, to make a brief study of the general theories of punishment and their applicability to the penal laws of Islam.

Hindu Law views punishment as a protector of the society. Manu says, "Penalty keeps the people under control, penalty protects them, penalty remains awake when people are asleep; so the wise have regarded punishment as a source of righteousness." The object of **Danda** or punishment is not to inflict pain but to eradicate evil. It is calculated to intimidate, to deter. Manu further says, "people are kept in check by punishment.... and this world is enabled to afford sources of enjoyment through fear of punishment". Kautilya says, "punishment if too severe, alarms men; if too mild, it frustrate itself. Punishment properly determined and awarded, makes the subjects conform to **dharma** (righteousness); when improperly awarded due to ignorance or under the influence of lust and anger, it enrages even hermits, not to speak of house-holders; punishment unawarded would verily foster the regime of the fish—the stronger swallowing the weaker."[33]

The Hindu Law also holds that punishment purifies the culprit. Manu says, "men who are guilty of crimes and are condemned (punished) by the King, are purified and go to heaven (paradise) in the same way as good and virtuous men". In a crude form, "it contains within it the idea of correction".[33]

Hegel's individualist's theory or expiatory theory regards that an individual must suffer on account of the harm caused by him to

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32. Abdur Rahim, *The Principles of Mohammadan Jurisprudence*, o.p.cit., p.363.
33. As quoted by O.K. Sen Penology, old and new (Cal.1943) p.90.

another. A criminal by harming another contracts' debt' to the sufferer or his heirs and by suffering the accused repays the 'debt'. Mc. *Taggart* holds that it is repentance for sinning.[34] It may, however, be noted that the State does not always punish every sin or moral wrong but only those acts which are considered crimes.

*Immanual Kant*, in his retributive theory of punishment holds that, "judicial punishment....can never serve merely as a means to further **another**, good, whether for the offender himself or for the society, but must always be inflicted on him for the sole reason that he has committed a crime..."[35] The injury inflicted upon the offender as a punishment must correspond quantitatively and qualitatively to the injury done by him. *Kant* argues that the only rightful punishment for murder is death. *Plato*, among the ancient philosophers and the Jewish Law also advocated the retributive theory. "A tooth for a tooth and an eye for an eye" was their underlying principle of justice. Sir *James Stephen* holds that the purpose of punishment is "to gratify the desire for vengeance by making the criminal pay with his body, as the criminal stands to the passion of revenge in much the same relation as marriage to the sexual appetite".[36] *Salmond* goes a step further and extends the element for avengefulness to the entire society and says that 'it gratifies the instinct of revenge or retaliation which exists not merely in the individual wronged, but also by way of sympathetic extension in the society at large."[37] Men can be effectively refrained from committing injustice if those who are not injured feel as much indignation as those who are." *Salmond* favours another purpose of punishment, namely, to prevent the offender from offending again in future. He says, "We hang murderers not merely that we may put into the hearts of others like them, the fear of a like fate, but also for the same reason for which we kill snakes, namely,

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34. Mc.Taggart: *'Studies in Hegelian Cosmology'* p.133.
35. Immanuel Kant : *'Metaphysic der sitten', Akademic Ausgabe*, (pp.15-17) as quoted by A.c. Erwing, *"The morality of puniahmwnr"* (pp.331-333).
36. Sir James Stephen : *'General view of the Criminal Law of England'*, p.99.
37. Salmond : *'Jurisprudence'*, 10th Ed.1947, p.177.

because it is better for us that they should be out of the World than in it."[38]

The central theme of penology is to uphold law and to present the evil-doer, as an example and a warning to such others, who are susceptible to commit crimes. Locke says that the criminal punishment makes crime "a bad bargain" for those who like to commit it. Punishment, therefore, should be so drastic as would strike terror into the hearts of those who may be criminally disposed. In other words, it deters others from committing such offences. Sir James Stephen says, that criminal law is itself a system of compulsion on the widest scale. "It is a collection of threats of injury to life, liberty and property if people do commit a crime".[39] In short the deterrent scheme aims at making the evil-doer an example to others and warning to those who are like-minded. Care must, however, be taken to see that cruel punishments do not become too frequent to harden the human minds adjusting themselves, like fluids, to the level of objects around them. In the 18th century England, while thieves were publicly hanged as a warning, the spectators were not infrequently plundered by the 'deterred' pick-pocketeers. Yet another theory of punishment advocates the treatment of the criminal, more as a patient than as a law-breaker. Prof. Vinogradoff observes : "The Judge stands to the criminal in the position of the doctor, who selects his remedy after diagnosing the disease and the resources of the patient's organisation."[40] Punishment should serve as a moral education. And to make a boy to learn a lesson which he dislikes, is not necessarily to punish him, though the lesson may possibly be more unpleasant to him than many punishments. Salmond rightly points out that "the present tendency to attribute exaggerated importance to the reformative element is a reaction against the former tendency to neglect it altogether and like most reactions it falls into the falsehood of extremes.[41] And Hans Von Henting aptly suggests that the most energetic reforming "effect

38. Salmond : *'Jurisprudence'*, 10th Ed.1947, pp.111-112.
39. Abul Hasanat : *'Crime and Criminal Justice*, Calcutta 1933, p.489.
40. Vinogradoff, *'Historical Jurisprudence'*, p.59.
41. Salmond : *'Jurisprudence'*, 10th Ed.1947, p.114.

would be to direct its efforts against the criminal breeding conditions of life which should be washed away like a swamp which breeds germs of infection".[42]

After a discussion of these well-known theories of punishment, if we look at those elements which have been kept in view while prescribing punishments in the Islamic legal system, we will be convinced that no particular theory as such, has been individually applied to in isolation from the others in the penal provisions of the Islamic law. A scrutiny of the punishments prescribed and the modes of their execution reveals that the Islamic legal system has synthesised in its scheme of punishment the various theories of punishment—the protective as well as the expiatory, the retributive as also the reformative, the preventive and the deterrent. Above all, however, is the predominant spirit of what has been remarked by Hans Von Henting that the environmental conditions of the Muslim society are such that the chances and the scope of commission of crimes is reduced to the minimum possible extent, whereupon the infliction of the most deterrent punishment is justified.

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42. Hans Von Henting : '*Punishment*', 1937, p.134.

# *Chapter - III*

# NATURE AND SCOPE OF FORNICATION AND ITS PUNISHMENT

## I. GENERAL SURVEY :

Under modern criminal jurisprudence, sexual offences are punished not to protect chastity of woman or to uphold sexual morality but in order only, to preserve the sanctity of marital and family life.[1] An unmarried woman who is of age, if commits premarital sexual intercourse, is therefore, not held criminally liable. But under Muslim law, chastity is protected and enforced legally and any violation of chastity known as **zina,** is severely punished.

The Qur'an calls the act as an obscenity (abomination) and an evil way.

Verily it is an obscenity and an evil way.[2]

انہٗ کان فاحشۃ وساء سبیلا
(قرآن)

Thus obscenity *per se*, is made punishable in the Islamic legal system when it manifests itself in forms such as for example, fornication. In the foregoing paras, we shall examine in detail the Islamic law relating to the crime of fornication, how it is defined, the procedural and substantive aspects of this branch of law, how and in what manner the offender is punished, what are the limitations of the law etc. etc.

As explained earlier, **zina** calls for **hadd** punishment and of the five **hudood** pointed out in the Qur'an, two pertain and relate to illicit cohabitation only *viz.*, **zina**, fornication and **kadhf**, false accusation of fornication. Explaining the law relating to **zina** in a single breath, we may state thus :

1. Hari Singh Gour, *The Penal Law of India*, Vol.III, 6th Ed.1956, p.2311.
2. Qur'an 17:32.

To constitute **hadd** for fornication penetration is the criterion. It must be committed within the territorial limits of **darul-islam**. **Zina** shall be established by the deposition of four male eye-witnesses.[3] If the accused confesses the guilt (which must be during four different occasions) the **Qadi** should enquire into validity of each and may give time to the accused to withdraw it.[4] The confession is valid only if the other party confirms it.[5]

In a **zina** case, the semblance of lawfulness, marriage and **milkiat** are recognised as valid.[6] If the accused commits this offence labouring under a doubt that the woman was his wife or slave woman of himself or of his son, he is saved from **hadd** punishment.[7] If the woman conceives, **hadd** is postponed until the milk period is over. If any witness dies **hadd** will not be inflicted because he might have reversed his version.

Punishment of **hadd** in **zina** varies according as the offenders being slave or free, and married or unmarried. The punishments prescribed can be summarised as follows :

(i) Stoning to death for the married partner;

(ii) Hundred stripes for an unmarried partner;

(iii) Fifty stripes to a slave (both for married and unmarried). The presence of the witnesses at the time of execution of the punishment by stoning is necessary. The witnesses will be required to throw stones first, if they refuse, the punishment will be set aside.

## II. ZINA, WHAT IT MEANS, NATURE AND SCOPE :

**Zina** is defined as the voluntary commission of sexual intercourse with a woman who is saheb-e-shahwat.[6]

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3. Mir Ahmed Shareef, *Islami Khanoon-e-Fojdari*, translation of *Kitabul-Ikhtiar*, p.97.
4. *Ibid.*, p.101.
5. *Ibid.*, p.98.
6. *Ibid.*, p.94.
7. *Ibid.*, p.97.

The intercourse of a man with a woman who is not his wife is unlawful, and prohibited absolutely. When there is neither the reality nor the semblance of this relation between the parties, their intercourse is termed **zina** or fornication, and subjects them both to the punishment of **hadd** *i.e.*, a specific punishment for vindicating the rights of God.[8]

"A knowledge of the illegality, however," says the **Fatawai Alamgiri**, is an essential condition to the infliction of the **hadd.** So that if the person was not aware of it, the punishment cannot be inflicted. And when there is a semblance of right, in some cases even where it amounts to a doubt (fiction), punishment is avoided".

The '**Fatawai Alamgiri**' goes on to add : "Semblance is of several kinds : First, **shubh fil fail,** or semblance (doubt) in the fact, also termed **shubh ishtibah** or semblance of assumption; which is, when a person supposes that something is a proof of right which is not so in reality". An instance of this is furnished in the case of a man who imagines that the slave of his wife is lawful to him, because he may make use of her services. "The benefit of this kind of semblance or doubt is allowed only when the person who entertains the doubt claims that he thought the intercourse to be lawful. If he does so, he would be exempted from the **hadd,** but otherwise it must be inflicted, because the intercourse is in reality **zina** (fornication).

"Second, '**shubh fil mahal**' or semblance in the subject, also termed **shubh hukmis** (legal semblance) because there is some actual proof of lawful right in the woman, though connection with her may, for some reason, be prohibited. Regard is, therefore, to be had to this semblance with reference to all persons, and its establishment is not dependent on the conception of the offender and his claim of legality for the connection is not positively **zina.** An example for this is to be found in a marriage with the wife's sister, whilst the first marriage is still subsisting.

"Third, **shubh fil akd** or semblance in the contract; and,

8. *Fatwai Alamgiri*, Vol.II, p.202.

according to Abu Hanifa, wherever a contract of marriage has taken place, whether it be lawful or unlawful, whether the illegality be one on which all are agreed, or with respect to which there is some difference of opinion, and whether the party be aware of the illegality or not, he is not liable to the **hadd**; but according to the two Disciples (of Abu Hanifa), when the marriage is one that is generally admitted to be unlawful, there is no **shubh** or semblance of right, and the party is liable to the **hadd**, if he was aware that there is none, though otherwise, he would be exempted."[9] It follows, therefore, that in the opinion of Abu Hanifa, connection under any contract of marriage is not **zina**; and that, in the opinion of his Disciples, whenever an union is by consensus unlawful, connection under it, is **zina**, if the contract was entered into with a knowledge of its illegality.

Fornication as defined by Joseph Schacht, in his article on **zina** in the Encyclopaedia of Islam is any sexual intercourse between persons who are not in the state or legal matrimony or 'concubinage'.[10] Professor Schacht, while defining fornication uses the word 'concubinage' which does not connote the true meaning and sense of the Qur'anic permission, "that which your right hand possesses, meaning an owned slave maiden". Perhaps he borrowed the term from the Jewish and Christian concept. However he corrected himself subsequently in his latest publication 'An introduction to Islamic Law' wherein he defined **zina** as intercourse without **milk** or **shubhatul milk**; '**milk**' meaning the right to it arising from marriage or ownership of a 'female slave', **shubha** exists with regard to the wife.[11]

Hedaya says, "The carnal conjunction which occasions punishment in **zina** or whoredom, (and this both in its primitive sense, and also in its legal acceptation), signifies the carnal conjunction of a man with a woman who is not his property, either by right or marriage or of bondage, and in whom he has no erroneous property,

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9. *Fatwai Alamgiri*, Vol.II, p.208.
10. Joseph Schacht, Art. 'Zina' *The Encyclopaedia of Islam*, Vol.IV London, 1934.
11. Joseph Schacht, *An Introduction of Islamic Law*, o.p.cit., p.178.

because **zina** is the domination of an unlawful conjunction of the sexes, and this illegality is universally understood where such conjunctions take place devoid of property, either actually or erroneously supposed".[12]

## III. MEANING OF ERRONEOUS CARNAL CONJUNCTION AND ITS ESTABLISHMENT :

Error in carnal conjunction is of two kinds :

(i) The error in respect of the act, which is termed **shoobha-ishtibah**, or error of misconception;

(ii) The error in respect to the subject which is termed **shoobha-hukmee** (error by effect) or **shub-e-milk** (erroneous propriety).[13]

The first of these distinctions of error is neither established nor understood except with respect to a man who mistakes an illegal carnal conjunction for legal, because **ishtibah** signifies the man having carnal intercourse with a woman under the supposition of the same being lawful to him, in consequence of his supposing something other than that which is necessary to constitute legality as affording an argument of such legality; it is, therefore, necessary that this mistake should have operated in his mind in order to establish **ishtibah**, or misconception, and hence this species of error is not understood, except in the case of a person who is under such misapprehension.

The second species of error is established, where the argument of the legality of carnal conjunction exists in itself, but yet practice cannot take place upon it, because of some obstacle and this does not depend upon the apprehension or belief of the person who commits the unlawful act; that is to say, men who so conceive and those who do not—And punishment drops in consequence of the

12. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.18-19.
13. *Ibid.*, p.19.

existence of either of these two species of error, on account of a well known tradition.

(A) Errors in respect of the act exists in eight several situations, and in all these situations the person who has carnal conjunction does not incur punishment, provided he declares that "I conceived that this woman was lawful to me" but should he admit his consciousness that the woman was unlawful to him, he incurs punishment. Those situations are as follows :[14]

1. The female slave of a man's mother;
2. The female slave of his father;
3. The female slave of his wife;
4. A wife repudiated by three divorces who is in **iddat;**
5. A wife completely divorced for a compensation and in her **iddat;**
6. An **am-walid**, who is in her **iddat** after emancipation with respect to her master;
7. The female slave of a master, with respect to his male slave;
8. A female slave delivered as a pledge, with respect to the receiver of such pledge.

(B) Error in respect to the subject exists in six situations and in all those situations a person who has carnal connection is not liable for punishment, even though he confesses the consciousness of such woman being unlawful to him. Those situations are as follows:[14]

1. The female slave of a man's son;
2. A wife completely repudiated by an implied divorce;

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14. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.20.

3. A female slave sold, with respect to the seller; before the delivery of her to the purchaser;
4. A female slave **Mamhoora** (that is, a slave stipulated to be given in dower to a wife) with respect to the husband, before seizin of her being made by the wife;
5. A female slave held in partnership, with respect to any of the partners;
6. A female slave delivered in pledge with respect to the receiver of such pledge according to the book of Pawnage.

**(1) Contract of marriage prevents punishment, although avowedly illegal :**

According to Abu Hanifa a contract of marriage is a sufficient ground of error[15] although the illegality of such marriage be universally allowed and the man entering into such contract - be sensible of this illegality. On the contrary the other jurists opined that a mere contract is not admitted as a legal ground of error, if the man be sensible of the illegality.

**(2) Connection with a wife divorced by implication does not induce punishment :**

If a man divorces his wife by implication, saying "you are divested" or "you are at your own disposal" and she chooses divorce and he afterwards has carnal knowledge of her within the term of her **iddat,** and should acknowledge that he knows her to be unlawful to him, yet punishment is not incurred.[16]

However, there is a difference of opinion among the companions relating to such case, for Omer holds that the forms above-mentioned are effective of only a single divorce reversible; and the same in all expressions of divorce by implication; he also

15. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit, p.20.
16. *Ibid.*, p.23.

holds the rule to be the same, where the husband intends three divorces as he maintains that here like-wise a single divorce reversible only takes place and that the intention of three divorces is not regarded.

**(3) Connection with the female slave of a son or grand-son :**

Punishment is not incurred by a man having carnal connection with the female slave of his son or of his grand-son although he should acknowledge his consciousness of such female slave being unlawful to him, for this case, the error is by effect[17]. It proceeds from an argument founded upon the words of the Prophet, who said to one with whom he was conversing, "Thou and Thine are thy father's"[17] and the grand-father is subject to the same rule as the father, as he is also a parent.

**(4) Connection with the female slave of his father, mother or wife where misconception is pleaded :**

If a person has carnal connection with the female slave of his father, or of his mother or of his wife, and pleads his conception that such slave was lawful to him, he does not incur punishment; neither is his accuser liable to punishment, but if he acknowledges his consciousness of the illegality, punishment is to be inflicted upon him and the same rule obtains where a slave has connection with the bond-maid of his master.[17]

**(5) Connection with a woman married by mistake is not liable for punishment :**

If a man engages in a contract of marriage with a woman and another woman be sent to him, the female relations declaring her to be the woman married to him by such contract, and he has carnal consummation with that woman, he does not incur any punishment,[18] but must pay the woman her dower, because Ali once

17. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.22.
18. *Ibid.*, p.24.

passed a decree to this effect and he also enjoined in his decree, that the woman should observe an **iddat**. Moreover, the man has proceeded upon apparent proof, namely the information of the woman's female relation, with respect to the subject of his error, since men can have no personal knowledge of or acquaintance with their wives prior to the matrimonial engagement, and hence the man in this case is the same as a person acting under a deception. *Abu Yousuf* holds the opinion that the accuser is liable to punishment, because the carnal conjunction is to all appearance legal with respect to the man, according to the information of the woman's female relations and, of course, his accuser becomes liable to punishment, as a decree must be founded upon what is apparent.

### (6) Connection with a woman under an unlawful marriage does not induce punishment :

If a man marries a woman whom it is not lawful for him to marry, and afterwards has carnal connection with her, he does not incur punishment, according to *Abu Hanifa*, but if he be at the time aware of illegality, he is to be corrected by a **tazir,** (discretionary punishment) the two disciples of Abu Hanifa and **Shafaii** have said that he is liable to punishment.[19] When he marries the woman, being aware of the illegality, because as the contract has not been executed in regard to its proper subject, it is ofcourse void. The woman here is not a proper subject of a marriage, because the proper subject of marriage, or any other deed, is a thing which is a proper subject of the effect of such deed. Now one of the effects of marriage is the legalising of generation, but as the woman is among those who are prohibited to the man, the contract of marriage with her is consequently, negatory, in the same manner as a contract of marriage between man and a man. The argument of *Abu Hanifa* is that the contract has taken place in regard to its proper subject, as the woman is a proper subject of marriage, because the proper subject of any deed is a thing which admits of the ends intended being obtained from it. The end of marriage is the procreation of

19. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.25.

the children, and to this every daughter of Adam is competent; the case therefore admits of the contract, being engaged in with respect to all its effects and of all its effects being obtained from it. But on account of the prohibition in the sacred text, the legalisation of generation is not obtained, and such being the case, error is occasioned, as error is a thing which is the appearance of a proof and not the substance of one; and as in the present case, the man has perpetrated an offence for which the stated punishment or hadd, is not appointed, **tazir** must be inflicted.

**(7) Whoredom committed by an infant or an idiot does not induce punishment :**

If a boy or an idiot commits whoredom with a woman who is of mature age and sound judgment, she consenting thereto, in this case there is no punishment, neither to the boy or the idiot nor to the woman.[20] Ziffer and Shafaii maintain that in this case the woman incurs punishment; and there is also one tradition of Abu Yousuf to the same effect, but if a man who is of mature age and sound judgment commits whoredom with a girl who is an idiot or an infant capable of copulation, in such case, punishment is incurred by the man alone, according to all the Doctors. The argument of Ziffer is that a plea on the part of the woman does not occasion the remission of punishment with respect to the man and in the same manner, a plea on the part of the man does not occasion punishment to be remitted with respect to the woman; because each party is responsible only for its own act. The arguments of the Doctors is that the act of whoredom proceeds from the man, the woman being no more than merely the subject of it, and hence it is that the man is dominated by the active term in copulation or whoredom and the woman by the passive.

**(8) Whoredom committed upon compulsion does not subject to punishment :**

If a sovereign prince should compel a man to commit

20. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.32.

whoredom, there is no punishment incurred by that man.[21] Abu Hanifa had held a prior opinion, that the man is liable to punishment, (and such is the doctrine of Ziffer) because the man cannot commit the act of whoredom, unless the virile member be properly distended, which distention is a token of desire on his part. Compulsion, therefore, cannot be proved with respect to him. The reason for the more recent opinion is that the means of compulsion, (namely, the proof of the sovereign) exists both actually and apparently, and the distention of the virile and the distention of the all virile member is no certain proof of desire, since it some times occurs independent of any operation of the mind, as in sleep, for instance; this circumstance, is of no weight in competition with a fact which admits of actual proof, namely, the compulsion. But if any other person than the sovereign should compel a man to commit whoredom, the man thereby incurs punishment according to Abu Hanifa. The two disciples have said that no punishment is incurred in this case,[21] because the compulsion is the obstruction to the punishment in the former cases may also proceed from others than the sovereign. But Abu Hanifa argues that this species of compulsion cannot be supposed to proceed from any except the sovereign; because no other person is possessed of the means of such compulsion, since the sovereign is enabled to repel it in all inferior persons, as the sovereign authority is instituted by the law for the purpose of repelling tyranny, and also, because all others stand in awe of the sovereign and hence no such compulsion can proceed from them. It is to be remarked that the learned in the law impute this difference of opinion between Abu Hanifa and the two disciples to the difference of the times in which they lived, for in the time of Abu Hanifa, others than the sovereign were not possessed of any power which it was not in the sovereigns power to repel, but in the time of the two disciples every petty ruler possessed a power independent of the sovereign and hence compulsion of others than the sovereign afforded, in those times, a ground of doubt sufficient to prevent punishment. Compulsion in case of a woman does not

21. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.32.

incur punishment. Once a few persons came to the second Caliph, Omar along with a woman who was riding on an ass and weeping, and gave the evidence that she committed **zina** (fornication). When Omar asked, she confessed and said that she did not know the fornicators who they were. By hearing this Omar set the woman free, because force was used in committing **zina** with that woman.[22] Once a **Zimmi** of Syria committed fornication with a woman by force; after being provided all the evidence, Omar, the Second Caliph sentenced the man and set free the woman because she was forced to fornication.[23]

### (9) Case of one of the parties confession whoredom and the other pleading the marriage :

If a man makes a confession four times, at four different appearances, before the Qadi "that he has committed whoredom with such a woman" and the woman should thereupon declare "that he had married her", or if a woman should thus make confession that "such a man had committed whoredom with her" and that the man should plead that "he had been already married to her" in this case no punishment falls upon either party.[24] Because the plea of marriage is possibly true and, therefore, occasions a demur but the man owes the woman a dower, since the enjoyment of the woman's person cannot be admitted graciously, as a woman's person is an object of respect.

### (10) Case of whoredom committed between infidel and aliens :

If an alien comes into an Islamic State under the protection, and commits whoredom with a zimmeea or female infidel subject, or if a zimmi or male infidel subject so commits whoredom with a female alien, punishment is to be inflicted upon the infidel subject

22. *Kitabul-Khiraj,* quoted by Mohd. Taqi Ameeni, *Ahkam-e-Sharia Mayn Halath vo Zamana-e-ki Revayath,* o.p.cit., p.78.
23. *Ibid.,* p.79.
24. Al-Marghinani, *Al-Hedaya,* translated by Charles Hamilton, Vol.II o.p.cit., p.33.

(according to Abu Hanifa) but not upon the alien.[25] This also is the opinion of Mohammad with respect to an infidel subject, where he is guilty of whoredom with a female alien; but if an alien be guilty of whoredom with a female infidel subject, in this case he holds that there is no punishment for either party. There is also an opinion recorded from Abu Yousuf to this effect; but he afterwards delivered another opinion, that punishment is incurred by all the parties concerned; both by the alien, and the female infidel subject, and also by the male infidel subject and the female alien.[25]

**(11) Auzai's Doctrine :**

The question is whether a Musta'min, a non-Muslim who enters Islamic territory under safe conduct is liable to **hadd** punishments for crimes committed in Islamic territory.

Auzai was influenced by the material consideration of whether the crime, adultery, was committed in public or not, which made his opinion inconsistence. The Iraqians from Abu Hanifa onwards showed a higher degree of technical legal reasoning by raising the question of the competence of jurisdiction; Abu Hanifa with Abu Yousuf and his other followers answered the question in the negative, and Ibne Abi Laila, who had formerly held the opposite opinion, joined them later.[26] Shafai made explicit the systematic distinction between religious sanction and civil rights (hudud-ullah and huquq-ul-adamiyin), distinction which was incipient in Auzais Doctrine, and was certainly in the mind of Abu Hanifa. He stands on narrower systematic ground than Abu Hanifa and Abu Yousuf, being concerned exclusively with the validity of the safe conduct and with what is covered by it, and not with the wider issue of jurisdiction. Shafai's Doctrine is, therefore, less technically legal than that of the Iraqians, but combines considerations of Islamic public policy with systematic consistency.

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25. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.29.
26. Joseph Schacht, *The Origins of Mohammadan Jurisprudence*, o.p.cit., p.286.

**(12) Connection with a wife thrice divorced (before the expiration of her iddat occasions punishment) :**

If a man pronounces three divorces upon his wife, and afterwards has carnal connection with her during her iddat and acknowledges his consciousness of her being unlawful to him, punishment is incurred,[27] because her possession by marriage, which legalises generation has been totally annihilated and hence there can be no error, as the Qur'an says that legality is destroyed in this case; and the jurists agreed upon this opinion. But if he were to declare that "he conceived or supposed, she was still lawful to him," punishment is not incurred because the apprehension is to be regarded, since the effects of marriage still remain, with respect to the establishment of the parentage of children, and the matrimonial restraint, and alimony. His apprehension, as above, is therefore, ofcourse to prevent punishment on account of error by misconception. And an **am-walid** after manumission, and a woman in a state of repudiation by khula or one divorced for a compensation (who are in their iddat) stand in the same predicament with a woman repudiated by three divorces, as their illegality is universally admitted and certain effect of marriage continue during their iddat, as well as, in the case of a wife under three divorces.

**(13) Punishment is incurred by connection with a slave of a brother :**

If a man has carnal connection with the bond-maid of his brother or of his uncle, he incurs punishment[28] although he should plead that he had conceived her to be lawful to him, because between such relations no community of interest exists. And the law is the same with respect to the female slaves of all other relations within the prohibited degrees, excepting those who are related to the man within the parental degree, (such as his father or his son) because between him and those prohibited relations no community of interest exists.

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27. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.22.
28. *Ibid.*, p.34.

**(14) Case of whoredom with the female slave of another and she dies in consequence :**

If a man commits whoredom with the female slave of another, to such a degree as that the said female slave dies, the man incurs two penalties, one the punishment of whoredom, and the other, the payment of the value of such slave to her owner, because he has here committed two offences, whoredom and homicide and hence the law is to be carried into execution with respect to both.[29] It is recorded by Abu Yousuf that the punishment is not incurred by the man the obligation of responsibility which lies upon him, is a cause of his property in the slave; and the occurrence of a cause of property, before punishment has taken place prevents the infliction of it (as where a thief, for instance, purchases the property stolen of the proprietor before his hand is struck off), and is the same as if a man were first to commit whoredom with a female slave, and then to purchase her of her master, in which case he incurs punishment, according to Abu Hanifa but not according to Abu Yousuf, and so in this case likewise. Abu Hanifa and Mohammad, say that the responsibility, in this case, is a responsibility for murder (in the manner of '**deeyat**' or fine of blood) which does not occasion a right of property (over the slain).

**(15) Acts of lasciviousness are to be corrected by Tazeer :**

If a man commits any act of lasciviousness with a strange woman such as **takhfeez**, (penem fricecus inter femora) he is to be corrected by tazeer, since such acts are illegal and forbidden by the word of God,[30] but a stated punishment is not appointed for them, Tazeer must, therefore, be inflicted upon that person.

**(16) Sodomy committed with a strange woman :**

There are two traditions with regard to sodomy, one was reported by Jabar and other by Akramah :

29. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.34.
30. *Ibid.*, p.26

> Jabar reported that the Messenger of Allah said : verily the most fearful of what fear over my people is the action of the people of lot.[31]
>
> Akramah from Ibne Abbas reported that the Messenger of Allah said : whomsoever you find doing the deed of the people of Lot, kill the doer and one on whom it is done.[32]

If a man copulates with a strange woman **inano** that is, commits the act of sodomy with her, there is no stated punishment for him, according to Abu Hanifa;[33] but he is to be corrected by **Tazeer**. The Jama Sagheer directs an aggravation of the **tazeer** or correction in this case, and says that the offender must be kept in a place of confinement until he declares his repentance; the two disciples have said that as this act resembles whoredom, the person committing it is subject to the stated punishment for whoredom; and there is one opinion of Shafaii to this effect; but another opinion of his however, is that the parties should be put to death, of whatever marital status they may be, that is, whether they be married or not, because the Prophet has said 'Slay both the active and the passive'.

The argument of the two disciples is that the act in question has the property of whoredom, as that is defined to be "an act of lust committed in that which is the object of the passion, completely, and under such circumstances as to be purely unlawful, and where the design is the ejaculation of semen". Abu Hanifa, on the other hand, argues, that this conjunction is not actual whoredom, because the companions of the Prophet have disagreed concerning their decrees upon it, for some of them have said that offenders of this kind should be burnt; some, that they should be buried alive; others that they should be cast down headlong from some high place, such as the top of a house, and then be stoned to death, and so forth.

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31. (25:108), Tirmizi Ibn Majah) cited by Fazul Kareem, *Al-Hadis.*, o.p.cit., p.546.
32. (25:106) *Ibid.*, p.545.
33. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.26.

Moreover the conjunction in question has not the property of whoredom as it is not the means of producing offspring, so as (like **zina**) to occasion any default in birth or confusion in genealogy—besides this species of carnal intercourse is of less frequent occurrence than whoredom, because the desire for it exists only on the party of the active and not of the passive, whereas in whoredom, desire exists equally on both sides. As to the tradition cited by Shafaii, it probably relates to a case where an extraordinary and exemplary punishment is requisite or where the perpetrator inculcates and insists upon the lawfulness of the act.

**(17) Bestiality :**

There are two traditions on bestiality, one reported by Ibn Abbas and the other by Ibn Abbas and Abu Hurairah :

> Ibn Abbas reported that the Messenger of Allah said : Who so comes to an animal (with lust), kill him and kill it with him.
>
> It was questioned to Ibn Abbas : What is the fault of the beast. He replied I have not heard anything about it from the Prophet but I saw him disliking to take its meat and to get any benefit therefrom while he did that with it.[34]
>
> Ibn Abbas and Abu Hurairah reported that he said : Whose comes to an animal (with lust), there is no ordained sentence on him.[35]

If a man commits bestiality, he does not incur **hadd** or stated punishment, as this act has not the properties of whoredom, for whoredom is a heinous offence, as being a complete act of lust to which men feel a natural propensity, but this definition does not apply to copulation with beasts.[36] All the four Imams are unanimous on

34. (25:107), Tirmizi Abu Dawood, Ibn Maja, cited by Fazul Kareem; *Al-Hadis*, o.p.cit., p.545-46.
35. (25:113 Tirmizi) *Ibid.*, 547.
36. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.27.

the point that such guilty man shall not be killed and that a lesser punishment shall be meted out to him. The killing, as mentioned in the former tradition was by way of threat. The animal however, shall be killed. Further Tirmizi reported from Sufyan-as-saori, who said that the latter tradition on the subject is more correct than the former one.[37] **Hadd,** therefore, is not incurred by this person, but he is to be punished by a discretionary correction. It is recorded, also, that the beast should be slain or burnt. This, however, is only where the animal is not of eatable species; but if it be of the eatable species it is to be eaten (according to Abu Hanifa).[38] Abu Yousuf holds that it should be consumed in fire in both cases.

## IV. OF EVIDENCE AND OF RETRACTION :

Fornication may be established before the Qadi in two different modes :

(i) By proof; (ii) by confession.

### (A) By Proof :

(1) **Four witnesses are required to establish zina** :—The manner of giving evidence to fornication is, by four persons bearing witnesses against a man and woman that they have committed fornication together because God has commanded in the Qur'an saying :

"And those who accuse honorable women but bring not four witnesses scourge them (with) eighty strips and never (afterwards) accept their testimony. They indeed are evil-doers."[39]

والّذين يرمون المحصنٰت
ثمّ لم يأتوا باربعة شهدآء
فاجلدوهم ثمنين جلدةً وّلا
تقبلوا لهم شهادةً ابدًا واولٰئك
هم الفسقون - (قرآن)

To the same effect, once the Prophet asked a man who brought before him an accusation against his own wife, "Bring

37. Fazlul Kareem, *Al-Hadis*, o.p.cit., p.546-48 (margin).
38. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.28.
39. Qur'an (24:4)

four men who may bear testimony to the truth of your allegation".[40]

**(2) Qadi should examine in respect to all the circumstances of the fact :**

When witnesses come forward to bear evidence in a case of whoredom, it is necessary that the Qadi examines them particularly concerning the nature of the offence; that is, that he asks of each witness respectively, "what is whoredom?" and, "in what manner have the parties committed it?" and "where" and "at what time" and "with whom?" because the Prophet interrogated Maaz[41] as to the manner of the fact, and the nature of the offence : and also because examination in all these particulars is a necessary caution since it is possible that the witnesses by the term **zina** may mean something not directly amounting to carnal conjunction, (such as seeing and touching), **zina** being a phrase occasionally applied to these also. It is possible moreover, that the whoredom may have been committed at a distant period, prior to the charge, which is therefore, inadmissible; it may also happened that the fact may have been committed under an erroneous conception of the parties with respect to its legality, such as, would occasion remission of punishment, and such as, neither the parties themselves nor the evidences against them are aware of, (as in a case where a man has connection with the female slave of his son); it is, therefore, requisite that the Judge examines the evidence minutely with respect to all these particulars, since some circumstance may appear in the course of such investigation, sufficient to exempt the accused from punishment.

**(3) Sentence is passed on evidence :**

When the witnesses shall thus have borne testimony completely. declaring that "they have seen the parties in the very act of carnal conjunction (describing the same), and the integrity of such evidence is also known to the **Qadi** from both an open and a

40. *Al-Hedaya*, supra, p.3.
41. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.2.

secret purgation, let him then pass sentence of punishment for fornication according to such evidence. The apparent probity of the witnesses does not suffice in the present case, but it is necessary that the Magistrate ascertains the probity, both by an open and a secret purgation, in such a manner that (possibly) some circumstances may appear sufficient to prevent the punishment, because the Prophet has said "Seek a pretext to prevent punishment according to your ability"[42] contrary to all other cases, in which the apparent integrity of the witness is (according to Abu Hanifa) hold sufficient. The mode of open and secret purgation is fully set forth under the head of evidence.

Mohammed has said, in the Mabsoot, the Qadi may imprison the accused, until he makes a purgation of the witnesses, because the person against whom the testimony is given stands charged with whoredom upon the evidence of witnesses; and also because the Prophet once ordered a person charged with whoredom to be imprisoned.[43]

**(4) Retraction of evidence in whoredom :**

(1) If witnesses bear evidence at a distant period after the perpetration of the alleged offence where there had existed no obstruction such as their distance from the Magistrate and so forth, their testimony is not to be credited except in a case of slander. It is recorded in the **Jama Sagheer** "if witnesses bear evidence against any person, with respect to theft, or wine-drinking or whoredom after a certain period of time shall have elapsed, such testimony is not to be received, but yet the person so accused of theft is responsible for the value of the goods alleged to have been stolen."[44] The principle upon which the case proceeds is that all evidence with respect to such punishments as are purely a right of God, is vitiated and rendered void by such a delay in the production

42. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.4.
43. *Ibid.*, p.4.
44. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.35.

of it as amounts to **Takadeem,** but with Shafaii it is not rendered void, for he considers those punishments as a right of the individual, and supposes evidence under this circumstance to be the same as confession inducing punishment; that is to say, as distance of time (**takadeem**) does not effect the validity of confession, inducing a distant punishment, so in the same manner distance of time does not forbid the reception of evidence respecting the rights of the individual because it is apparent that the evidences speak truly; and the same reason holds in such punishment as are purely a right of God.

(2) **Takdeem** or distance of time as it prohibits the admission of evidence in the first instance, so it prohibits according to the jurists the infliction of punishment after the decree of the Qadi, if, therefore, the convicted person were to abscond, after having received a part of the punishment and after the lapse of a period, sufficient to constitute **takdeem**, be taken and brought back, the reminder of the correction cannot then be inflicted upon him, - because the infliction of the whole punishment is included in the Qadi's decree; and a part of it stands in the same predicament with the whole; and as the Qadi, because of distance of time, could not decree punishment, so neither can he, in the same circumstance, decree the infliction of the remainder of the punishment.

(3) There are various opinions among the learned respecting the limitation of the **takdeem** and distance of time. In the **Jama Sagheer** the limitation appears to be six months; and the same is mentioned by **Tanveer.**[45] Abu Hanifa does not prescribe any limitation, but leaves it to the discretion of the Magistrate to be determined according to the customs of each respective age or country. It is recorded from Mohammed that he fixed the limitation to one month, as any lesser span of time, falls within the description of Ali.[45]

(4) If witnesses bear evidence against a person "that he has committed whoredom with a certain woman" and the woman be

45. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.38.

absent, yet punishment must be inflicted on the man: but if witnesses bear evidence against a man that he has committed theft, and the owner of the property stolen be absent, the hand of the accused cannot be cut off. The difference between these two cases is that, in theft the previous claim of the plaintiff is a necessary condition to the admission of evidence, but not in fornication—and the owner of the property stolen being absent, no claim can be instituted.

(5) If witnesses give evidence against a man "that he has committed fornication with a woman whom they do not know" punishment is not to be inflicted upon the woman. It is possible that the woman may be his wife or his slave, and this, with respect to a Muslim is most probable.[46] But if a man makes confession that he has committed fornication with a woman unknown, punishment must be inflicted on him, since if the woman with whom he committed the act had been either his wife or his slave, she could not have been unknown to him.

(6) If two witnesses give evidence against a man, that "he has committed whoredom with such a woman, and forced her thereto" and two other witnesses give evidence to the same fact but with this variation that "the woman was consenting", in this case, (according to Abu Hanifa and Ziffer) punishment drops with respect to both the parties; and such also is the opinion of Shafaii.[46] The two disciples of Abu Hanifa say that punishment is in this case to be inflicted on the man alone because the varying witnesses do yet agree in this that the man has committed whoredom which is the occasion of punishment to him; for the only difference between the witnesses is that one of the parties testifies to an additional offence, namely his having forced the woman, which does not occasion the remission of punishment with respect to him; contrary to the case of a woman, with respect to whom, punishment drops because her consent is the condition on which, her being liable to punishment depends, and this consent is not proved, because of the

46. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.39.

contradiction among the witnesses. The arguments of Hanifa on this point are two-fold—First the evidence is contradictory with respect to the man because fornication is an act, committed by two partners, the man and the woman, and as the evidence is contradictory with respect to the woman, it must be held so with regard to the man likewise;—secondly, the two witnesses, who bore testimony to the consent of the woman, are slanderers, and consequently their testimony is unworthy of any credit.

(7) If two witnesses bear evidence against a man that "he has committed fornication with such a woman in **Koofa**" and two others, "that he had committed such fornication with that woman in **Basra**", in such case, punishment drops with respect to both the man and the woman because the circumstance alleged in the act of fornication, is contradicted by the contradiction with respect to the place.[47] If witnesses contradict each other by two persons bearing evidence that such a man has committed fornication with such a woman in such a spot of such a house, and by two other persons giving evidence that the man had committed the fornication with that woman in another spot of the house in this case punishment is to be inflicted upon that man. This is upon a favourable construction.[48]

(8) If four witnesses bear evidence against a man "that he has been guilty of whoredom with such a woman at sunrise in Hyderabad and four other witnesses give evidence against the man that he has been guilty of whoredom with such a woman at sunrise, in Secunderabad (two nearer places), in this case neither the man nor the woman are liable to punishment for whoredom, nor are their accusers liable to punishment for slander.[48]

(9) If four witnesses bear testimony against a woman that she has committed whoredom with such a man—and it appears upon examination made by females employed for that purpose that

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47. Al-Marghinani, *Al-Hedaya,* translated by Charles Hamilton, Vol.II o.p.cit., p.40
48. *Ibid.*, 41.

the woman is still a virgin, in such case neither of the persons thus accused are liable to punishment for whoredom : nor are the accusers liable to punishment for slander, because the evidence of the female employed to examine the woman accused is a proof which suffices to prevent the infliction of punishment of whoredom upon the parties accused; but it is not a proof sufficient to subject the accusers to punishment of slanders, punishment for whoredom is therefore not inflicted on the accused; nor are the accusers liable to punishment for slander.[49]

(10) If four witnesses give evidence against a man that "he has committed whoredom with such a woman", and it should happen that these witnesses are blind, or have ever been punished for slander, or that one of them is a slave, or has been punished for slander; in this case the witnesses are all liable to punishment for slander; but the accused does not incur punishment for whoredom,[49] because as a matter of property cannot be determined by the evidence of such witnesses, it is impossible that punishment should be established by it; and the witnesses, where they are all blind, or have all before suffered punishment for slander, are incapable of bearing evidence; and where one of them is a slave, is totally incapable of bearing evidence; and so also one of them who has before suffered punishment for slander; by their evidence therefore even a doubtful whoredom is not established and hence their testimony becomes converted into slander; therefore they are slanderers and punishment for slander is consequently incurred upon them.

(11) If four witnesses bear evidence to whoredom at a time when they are reprobate,[50] or if this character should be affixed upon them by competent proof after they have given evidence, they are not liable to punishment for slander; because although the evidence

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49. Al-Marghinani, *Al-Hedaya,* translated by Charles Hamiltan, Vol.II o.p.cit., p.42.

50. In Arab. Fasik. It is elsewhere rendered unjust but the term here adopted approaches perhaps, nearer to the real meaning. Fasik signifies a person who neglects decorum in his dress and behaviour and whose evidence therefore is not held to be admissible.

of a reprobate person be defective from his veracity being liable to suspicion on account of the badness of his character, yet he is a competent witness in so much that if a Qadi issues a decree upon a evidence of a reprobate person, his decree is valid according to the jurists, the evidence of reprobate person, therefore, goes to establish a doubtful whoredom, and they are consequently not exposed to punishment for slander; and since, moreover, from the detect in their testimony, on account of being reprobate, a doubt appears that whoredom has not been committed, the accused are, therefore, not liable to punishment for whoredom. Shafei dissents from our opinion concerning this case as he holds a reprobate person to be incapable of being an evidence, and consequently that he stands in the same three predicaments as a slave.[51]

(12) If fewer than 4 persons bear evidence to whoredom, punishment for slander is applicable to them. This effect is induced because although their testimony be good, yet testimony to whoredom is so accounted only where it amounts to evidence; and the testimony of fewer than four persons, in a case of whoredom is not evidence, so as to be accounted good; wherefore, it is slander.[52]

(13) If four persons bear evidence against a man, "he has been guilty of whoredom" and the Qadi should inflict punishment for whoredom upon the parties accordingly and it should afterwards appear that one of the witnesses is a slave, or has at any time being punished for slander, punishment is incurred by all the witnesses as the witnesses are on this occasion only 3 in number.[52] It must, however, be observed that in this case no **Arish**, or fine of damage, is due on account of such flagellation, either from the witnesses or from the public treasury: but if, in consequence of the evidence, the person accused should have been stoned to death by a sentence of lapidation, the **Deyit**, or fine of blood, is due from the public treasury. This is the doctrine of Abu Hanifa.[53]

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51. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.43.
52. *Ibid.*, p.43.
53. *Ibid.*, p.44.

(14) If four witnesses bear testimony to an evidence given by four other witnesses against a man, of his having committed fornication, punishment is not to be inflicted upon the person so accused because evidence in support of evidence introduces an increase of doubt, since wherever, in the recital of a fact, channels of communication are multiplied, the doubt of its truth increases in proportion; and there is in this case no necessity, for considering the secondary witness in the light of original witnesses.[54]

(15) If four witnesses give evidence against a man, that he has committed whoredom, and he suffers lapidation, and one of the witnesses afterwards retract, punishment for slander is to be inflicted upon him alone, and he is also responsible for one-fourth of the fine of blood.[55]

If one of them were to retract before the execution of lapidation and after the sentence has been pronounced and passed by the Qadi, in this case punishment for slander is to be inflicted on all witnesses; and the punishment of the accused is remitted. This is the doctrine of the two elders.[56]

(16) If four witnesses give evidence of whoredom against a man, and these witnesses be justified by **Tazkeeat**[57] and the accused suffer lapidation, and it should afterwards appear that those witnesses were idolaters, or slaves (by the purgators retracting their evidence of justification, and declaring them to be slaves, or idolaters) in this case, the fine of blood is due from the purgators, according to Abu Hanifa. His two disciples say that in this case, the fine of blood falls upon the public treasury.[58]

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54. Al-Marghinani, *Al-Hedaya,* translated by Charles Hamilton, Vol.II o.p.cit., p.45.
55. *Ibid.*, p.46.
56. *Ibid.*, p.47.
57. That is by a certain number of other witnesses bearing testimony to the competency, of witnesses who are giving evidence in any cause, the former being denominated the Mozakkees or purgators; the nature of this mode of justification is exhibited at large in treating of Evidence.
58. *Al-Hedaya,* supra p.48

(17) If four persons bear testimony of whoredom against the man and the Qadi sentenced them to be stoned and any person should slay him, and it should afterwards appear that the above witnesses were incompetent, in such case, the fine of blood falls upon the slayer, according to a favourable construction of the law.[59]

(18) If four witnesses bear evidence of whoredom against a man and the accused should plead that "he is not a married man" and it should happen that he has a wife who has brought forth a child to him (in other words, should deny the consummation of his marriage, after the establishment of all the conditions of it) he is to be stoned, because the effect of the establishment of the child's parentage is a consequence of his having had carnal communication with his wife (whence it is that if he were to pronounce a divorce upon her, a divorce reversable takes place); And his being a married man, is established, on account of the aforesaid affect: and if the wife should not have borne a child, yet if one man and two women, as witnesses, bear testimony to the marriage of the accused, in this case, lapidation is to be inflicted upon him. Shafaii says that the accused in this case, does not suffer lapidation; and his opinion is founded on his doctrine in the laws of evidence, that "the testimony of women is not admissible, excepting in cases of property."[60]

**(B) By Confession :**

**(1) Confession must be repeated on four different occasions:**

The second mode of establishing fornication is by confession. The confession which establishes whoredom is made by a person of sound mind and mature age acknowledging himself (or herself) guilty of whoredom four times, at four different appearances, in the presence of the Qadi, he (Qadi) declining to receive the confession and sending the person away the first, the second and the third time. The maturity and sanity of the person confessing are conditions

59. *Al-Hedaya*, p.50.
60. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.52.

insisted upon, because the declaration of an infant or an idiot is not worthy of any credit or because the acknowledgment as such is not sufficient to induce a sentence of punishment. The condition of confession being made four times at four different appearance is agreeable to the Jurists. According to Shafaii, a single confession in a case of whoredom is sufficient[61] because he considers the law to be the same here as in all other cases, the confession of acknowledgment of any circumstance being the means of disclosing or discovering that which is so confessed or acknowledged; and a single confession is fully adequate to this purpose, a repetition being in no manner of use, since the disclosure or discovery is not in any degree increased or amplified by it : contrary to plurality of witnesses, as the abundance of witnesses is a means of removing all doubt with respect to their veracity, and of affording fuller satisfaction to the mind; whereas, by the repetition of the declaration of a single person as in case of confession no such additional satisfaction is obtained. The arguments of Hanafi Jurists in opposition to what is here advance by Shafaii are two-fold. First, is the case of Maaz, on whom the Prophet would no decree any punishment until he should have made confession of his offence four different times at four different appearance where it is to be concluded that if a single confession had sufficed and if it had been proper to proceed to punishment upon the force of it alone, the Prophet would not have delayed to inflict until the confession should be four times repeated as above. Secondly, as in evidence to whoredom witnesses are requisite, so also in the confession thereof four repetitions are requisite, and for the same reason, namely that it is laudable to conceal infirmity; and this condition of the repetition of confession has a tendency to conceal infirmity. For plurality of confessions, a plurality of appearances on the part of the confessing person is necessary, since the effect of unity of place or appearance is to render the separate declaration of the same thing as one declaration; and hence four confessions, in a single appearance, amount only to a single confession and a confession relates only to

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61. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.5.

the person confessing, the unity, or otherwise for his appearance is regarded and not that of the Qadi's assembly : and this appearance is made four separate times, by the Qadi repelling the persons' first confession, and saying to him "Thou art mad!" and such other words, the person upon the Qadi thus repelling his confession, going forth so as to be out of the Qadi's sight, and returning again and repeating his confession; and so on to the fourth time.[62] This is recorded from Abu Hanafi, on the authority of the conduct of the Prophet in the instance of Maaz, whom he thus sent out of his sight three different times.

## 2. The person confessing must be particularly examined :

When confession shall have been made in this manner four different times, the Qadi must then proceed to examine the person so confessing, asking him "what is whoredom?" - and, "where, and in what manner, and with whom—have you committed this whoredom".[63] All which duly observed the person confessing becomes then properly obnoxious to punishment, as the proof is complete. The advantages attending the examination of the confessing person have been already explained under the head of witnesses bearing evidence to whoredom; once a case of a woman charged of fornication was brought to Omar's Government. The woman confessed her guilt several times. Hadd punishment would have been pronounced, but for Ali's intervention who said :

> "She talks like a person having no knowledge of prohibition of fornication in Islam".[64]

Hearing this comment and agreeing with Ali, Omar absolved her from **Hadd** punishment. This suggests that if a defaulter on a close examination is found to be ignorant of the fact that a particular act constitutes an offence, he should not be punished for committal

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62. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.6.
63. *Ibid.*, p.7.
64. Mohammad Taqui Ameeni, *Ahkam-e-Sharia mayn Halat vo Zaman-e-ki-Raiyat*, o.p.cit., p.78.

of such an offence. It might be observed that although it be directed that the Qadi shall examine the witnesses with respect to the time of the perpetration of the fact, yet it is not requisite to put a similar question to a person who confesses, because that delay which would impeach the credibility of a witness does not, in any respect, impugn the credibility of a person who makes a voluntary confession: Some, however, have said that if the Qadi interrogates such a person with respect to the time of the fact it is lawful since it is possible that it may have been committed during infancy.

**(3) A person may retract from his confession :**

If a person confessing should deny the fact and retract from his confession, either before or during the infliction of punishment, his retraction must be credited and he must forthwith be released. Shafaii and Ibn Laila have said that retraction after confession is not to be credited, and that the punishment must be inflicted since it has already been incurred by the confession.[65] They hold that it cannot be done away in consequence of denial as in a case, where fornication is established against a person upon the testimony of witnesses or as in a case of retaliation or of punishment for slander; that is to say, when retaliation or punishment for slander are once established upon the confession of the offender, they do not drop in consequence of his subsequent denial of the fact; and so in this case likewise punishment cannot be withheld. The argument of the Jurists is that denial after confession is an intimation, which (like the confession) may be either false or true; and there is no person to disprove such denial; and hence, from the inconsistency between the confession and the denial, a doubt arises concerning the confession; and punishment drops in consequence of any doubt : contrary to intimations which involve the rights of individuals, (such as retaliation and punishment for slander) as the claimant of the right, in those cases, is the disprover of the person who has confessed, when he afterwards denies, which is not the case in any matter, involving merely a right of the law.

65. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamiltòn, Vol.II o.p.cit., p.7.

It is laudable in the Qadi or Imam, before whom confession of fornication may be made, to instruct the person confessing to deny it, by saying to him "Perhaps you have only kissed or touched her" because the Prophet spoke likewise to Ma'az, and Mohammad in the **Mabsoot**, adds that the Judge may also examine the confessing person with respect to such circumstances, as, if made to appear, would tend to his entire exculpation, such as, "whether the fact confessed may" not have been committed in marriage", or "under an erroneous misconception of its legality."

## V. MANNER OF PUNISHMENT AND INFLICTION :

### (1) An unmarried free person is to be scourged with one hundred stripes :

If the person convicted of fornication be free, but unmarried, the punishment with respect to him is one hundred stripes, according to what is said in the Holy Qur'an :

"The whore and whoremonger shall ye scourge with a hundred stripes"[66]

الزّانية والزّانی فاجلدوا کلّ واحدٍ منهما مائة جلدةٍ۔ (قرآن)

Jurists consensus of opinion about this text is that it applies to all those, other than married.

### (2) Mode of executing scourging :

It may be noted that the hundred stripes inflicted by the decree of the Magistrate must be administered with a rod which has not knots upon it; and that the stripes must be applied with moderation, that is to say, neither with severity, nor yet with too much leniety : when about to inflict correction Ali used to smooth off from the rod any knots which might happen to be upon it; and as too much severity on the one hand tends to destruction, so on the other hand too much leniety is inadequate to the design of correction. And when punishment is to be inflicted on any person, it is necessary that he be stripped naked; that is to say, that all the

66. Qur'an (24:2)

clothes be taken off, except the girdle; because Ali directed so in this matter; and also, because the punishment is in this way administered with the greatest effect : but as the removal of the girdle from the body would expose nakedness, it is therefore to be left.

**(3) The stripes must be not all be given on one part of the body :**

It is requisite that the hundred stripes be given not all upon the same part or member of the person upon whom the punishment is inflicted, but upon different parts as it might otherwise attended with danger to life; and none of the stripes must be inflicted on the face, the head, or the privities, because the Prophet once said to an executioner "In inflicting the punishment, take care not to strike the face, the head, or the privities"[67] Abu Yousuf has said that one or two strokes may be given on the head as Abu Bakar once said to an executioner "Strike on the head, because there the devil resides."[68]

**(4) Scourging must be inflicted upon the man standing and upon a woman sitting :**

When a man is to be scourged for fornication he is to receive his punishment in a standing posture, because Ali has said 'Correction is to be inflicted upon men standing and upon woman sitting" and also, because the proper infliction of punishment depends upon it's being open and public, which is best effected by its being received in a standing posture; but yet as a woman is nakedness[69] in thus administering the correction to her there might be an apprehension of the exposure of nakedness. It is to be observed that in administering punishment it must not be inflicted in the way of Mid[70] concerning the meaning of the term Mid there are various

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67. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.11.
68. *Ibid.*, p.11.
69. Satr, that is, every part of a woman's person is equally indecent to be seen and must, therefore, be covered always (except, of course, the face and hands upto the wrists).
70. Literally length; it admits of various applications.

opinions : some say that it signifies laying a person on his face upon the ground, and stretching out his limbs; some, that it signifies the executioner drawing the rod over his own head; others, that it signifies the executioner drawing back the rod, after giving the blow; but the correction must not be inflicted in the way of Mid, according to any of these acceptations, as it is more than what is due.

**(5) A woman is not to be stripped :**

The punishment of fornication is the same with respect to both sexes, as all the texts which occur in the sacred writings upon these subject extend equally to both; but yet a woman is not to be stripped, neither is her veil to be taken off, but only her robe, or other outward garment, as the removal of any other part of her dress would be offensive to modesty; but as the robe or outward garment would prevent the effect of the correction, and the removal of such is not indecent, she is to be stripped of these.

**(6) A married person convicted of whoredom is to be stoned:**

When a person is fully convicted of fornication, if he be married, let him undergo the punishment of **rajm**, that is, lapidation, or stoning to death[71] because the Prophet sentenced Ma'az to be thus stoned to death, who was married. Abu Dawood relates the following tradition of the Prophet :

> Ayesha reported that the Messenger of Allah said : It is not lawful to take the blood of a Muslim who bears witness that there is no deity but Allah and that Mohammad is the Apostle of Allah except for either of three things : Fornication after marriage as he is subject to stoning to death, a man who comes out fighting with Allah and His Prophet as he shall be killed, hanged or banished from the land; or one who kills a soul and then he shall be killed for it.[72]

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71. Al-Marghinani, *Al-Hedaya,* translated by Charles Hamilton, Vol.II o.p.cit., p.8.
72. (25:79), Abu Dawood Fazlul Kareem *Al-Hadis* Book II. o.p.cit., p.525-526.

In the light of this tradition, the sentence for a married partner who has committed fornication is stoning to death and all the companions of the Prophet are agreed on this measure of punishment.

### (7) Definition of the state of marriage which subjects an adulterer to lapidation :

The state of marriage necessary to induce lapidation, requires the whoremonger be of sound understanding and mature age and a free Muslim and has consummated marriage with a woman in a lawful manner at a time when she also is sane, free, adult and a Muslima.[73] This is the definition of Abu Hanifa and Abu Yusuf. According to Mohammad and Shafaii the state of marriage in question requires simply that the whoremonger be free, and a Muslim and one who was consummated in a lawful marriage with a woman of the same description. The author of the Hedaya substantiates these conditions thus : it is to be considered, however, that sanity of intellect and maturity of age are conditional to the receiving of punishment, since without these men are incapable of reading or understanding the ordinances of the law : and the other requisite besides these two, are stipulated in order that the sin may appear in its greatest magnitude, in consideration of the magnitude of those blessings under which it is committed, as ingratitude for the blessings of God is greatest, and most atrocious, when these blessings are enjoyed in the highest degree. The particulars aforesaid, namely, the Islamic faith, and freedom, and the enjoyment of a woman in a lawful marriage, are among the greatest blessings of life, wherefore lapidation on account of fornication is ordained in cases where all these circumstances exist; and hence lapidation is enjoined when these conditions exist : contrary to the superiority derived from the other gifts of nature or of fortune, such as family, learning, capacity, beauty and wealth, which are not conditions, because the law has no regard to those circumstances. It is also because freedom, sanity, maturity and Islamic faith are alone sufficient to constitute the magnitude of the sin of whoredom so as to subject the offender to

73. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.14.

lapidation, since, by virtue of freedom, a man is enabled to contract himself into a lawful marriage, and by virtue of a lawful marriage he is enabled lawfully to indulge his carnal appetite and by such indulgence to allay his passions; and by virtue of being a Muslim he is enabled to marry a Muslima, which fixes and confirms the belief of the prohibition of fornication to him; all these things, therefore, particularly forbid and inhibit a man from the commission of fornication; and a sin is great in proportion to the force of the inhibitions under which it is committed. The sect of Shafaii differs from the Hanafi Jurists with respect to that part of the proposition which asserts that the profession of the Muslim faith is a requisite condition : and there is also a record from Abu Yousuf to the same effect. Their argument is, that in the time of the Prophet a Jew committed fornication with a Jewess, and the Prophet ordered them both to be stoned : but to this, Hanafi Jurists reply that the Prophet passed that sentence in conformity with the **Tawreet**, or Jewish law and the declaration of the Prophet, "whosoever is not a true believer shall not be regarded as married"[74] is a confirmation of this. The consummation now mentioned as a condition is understood in the conjunction having taken place so as to require the prescribed ablutions; and as it is a condition essential to such a marriage as induces lapidation, that the woman, at the tie of consummation, be of the same description with the man, in the points of sanity, maturity, freedom and profession of the faith, it follows that if a man, were to consummate with a wife who is an idiot, an infant, a slave, or an infidel, he is not considered as married in this sense, since on account of this circumstances the advantage of the matrimonial enjoyment are incomplete because a man has a natural aversion to consummate with a lunatic woman; and he can have but little gratification with one under age, where desire is not reciprocal; and in the same manner, he has not a strong desire to consummate with a slave, as in that case, his children are slave-born; and so also, the enjoyment of a wife who is an infidel affords less satisfaction, because of the difference of religious principles; in all these cases, therefore, the advantage of the carnal enjoyment is defective, whence the husband

74. Al-Marghinani, *Al-Hedaya,* translated by Charles Hamilton, Vol.II o.p.cit., p.15.

of such woman does not by consummation, become a **mahsan**, or married man in that sense which induces lapidation. And the rule is the same where the husband is an idiot, an infant, a slave, or an infidel and his wife sane, adult, and a Muslima. Abu Yousuf has said that where the wife is an infidel, her husband, being a Muslim by consummating his marriage with her, he becomes a married man; but in reply to this, besides what has been said above it is to be remarked that the Prophet has declared "A Muslim is not rendered a married man by connection with a Christian, nor, is a freeman rendered married by connection with a wife who is a slave, nor a slave by connection with a wife who is a free."[75]

**(8) Case of punishment of rajm stoning to death, in Islam :**

Here we dwell deep into the validity or otherwise of stoning an adulterer or adulteress to death as a punishment prescribed by Islam for the married partners of fornication, it would be apt to deal in brief, the sources of law in Islam and its well-accepted process of legislation.

Qur'an and the traditions, as we know well, are the primary sources of Islamic law while Ijma and Qiyas are its secondary sources. The Qur'an is composed of such manifest revelations as were made in the very words of God. No doubt can reasonably be entertained as to the authenticity of any verse of the Qur'an, the whole of which is held to be **mutawatir** that is, proved by universally accepted testimony. Such testimony according to Muslim jurisprudence ensures certainty of belief, as it precludes all possibilities of concoction of error.[76]

The second primary source of Islam lies in the traditions of the Prophet. They include his dicta, acts and practices, so far as they fall within the purview of all. It is said that they were all inspired and are called indirect revelations : It may be mentioned in this connection, that revelation (**wahi**) has been of two kinds : manifest

75. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.16.

76. Abdul Raheem, *Mohammadan Jurisprudence*, o.p.cit., p.69 and 71.

(**zahar** or **jali**) and internal (**batin** or **khafi**) while the Qur'an consists of the manifest revelations, the precepts and opinions of the Prophet delivered by him from time to time are termed internal revelations. The universally accepted principle of Islamic jurisprudence is that the precepts and practices of the Prophets constituting 'Sunna' or traditions have binding force law as do the verses of Qur'an. The only question to be settled is whether a particular tradition is genuine and authentic, and once its authenticity is proved beyond doubt, it is as binding in force as any verse of the Qur'an. It may be remarked in this connection that one of the tests of authenticity of a tradition is that, it does not contradict a law or rules laid down by the Qur'an.

'**Ijma**' is the third course of Islamic law. It is defined as agreement of the Jurists among the followers of the Prophet Mohammad in a particular age, on a question of law.[77] Its authority as a source of law is founded on certain sayings of the Prophet, which are, as for example : "My companions are like stars; if you follow them, you will tread the right path". "My followers will never agree upon what is wrong"[78] "It is incumbent upon you to follow the most numerous body".[79]

The four Sunni Schools of law hold **ijma** to be a valid source of law not only upon the authority of the above tradition but also on the unanimity of the opinion to the effect among the companions of the Prophet.[80]

After **ijma** or consensus of juristic opinion, comes the fourth source of Islamic law *viz.*, **Qiyas**, or analytical deduction. For our present purpose, we need not go into further details about this source.

The importance of this introduction with regard to the sources

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77. *Taudih* p.498, *Mukhtasar* Vol.II p.29, *Jamir-l-Jawami* Vol.III p.288.
78. Uddis commentary Vol.ii, p.34.
79. *Kashu-l-Israr,* Vol.iii, p.258 as quoted by A.R.
80. *Bazdawi* p.253 *Taudih* p.283 *Mukhtasar,* Vol.ii, p.30, *Jam'ul-l-Jawami,* Vol.iii, p.308. (All are as quoted by Abdur Raheem, *Mohammadan Jurisprudence,* o.p.cit., p.115-116).

of Islamic jurisprudence in the context of punishment of '**rajm**' is of particular interest in view of the various arguments and counter-arguments in favour of **rajm** as a measure of punishment for a married partner of fornication.

So far as punishment for fornication is concerned the Qur'an says :

(1) As for those of your woman who are guilty of lewdness, call to witness four of you against them. And if they testify (to the truth of the allegation) then confine them to the houses until death takes them over or (until) Allah appoints for them a way.[81]

(2) The adulteress and the adulterer, flog each of them, giving a hundred stripes, and let not pity for them detain you in the matter of obedience to Allah, if you believe in Allah and the last day, and let a party of the believers witnesses their chastisement.[82]

(3) And when the slave girls are taken in marriage, then if they are guilty of fornication, they shall suffer half the punishment which is inflicted upon free woman.[83]

An analysis of the above verses would show that the Qur'an suggests death after confinement for women proved of the charge of fornication, without however, mentioning their marital status, until further orders. It is silent also about men charged of fornication. The second verse prescribes a definite measure of punishment for both the male and female partners but is silent about their marital status. it is here that certain difference of opinion is to be found among the later jurists, one holding the view that the verse is confined, in its application, to the unmarried partners while the other arguing that the verse extends in it scope to both the unmarried as well as the married partners.

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81. Qur'an 4:15.
82. Qur'an 24:2.
83. Qur'an 4:25.

Those who opine that stoning to death '**rajm**' has not been prescribed as a punishment for a married partner of fornication rely wholly and solely upon the Qur'an and hold that since no such injunction is to be found therein (while, on the other hand, definite orders of scourging with 100 stripes are to be found there), the punishment in both the cases, whether married or unmarried, is 100 stripes only. They, however, fail to quote instances during the life-time of the Prophet or his companions where only flogging was resorted to and no death punishment was inflicted upon in case of married partners. The other opinion which is predominant, relies upon the second primary source of Islamic law *viz.*, Traditions of the Prophet as also upon '**ijma**', the third source. Certain jurists have tried to establish that there was also a verse of **rajm** in the Qur'an which was subsequently abrogated in language (Naskhul Quira'at) but not repealed in its enunciation (Nashkul Hukm). They relay in this regard upon a supposed narration of the second Caliph, *Omer*. But on a close scrutiny of both this supposedly narration of *Omer* and the theory of **Naskhul Quira'at** it appears that they are unsound, illogical and far-fetched inasmuch as there is a wide scope to introduce any innovation and to adulterate the only purified source of Islamic law *viz.*, Qur'an under the proposition if given current to, of **Naskhul Quira'at** and **Naskhul Hukm**. Again when one admits that there are certain well established and well-accepted sources of a particular legal system, there is no meaning in admitting and accepting one to the complete exclusion of others, particularly when no contradiction as such persist, among them. By implication, it means nothing but the denial of the other sources as a valid source of law.

One need not, therefore, dive deep into the first primary source of Islamic law, *viz.*, the Qur'an only to know whether **rajm** has been prescribed as a measure of punishment for adultery after marriage. It would just serve the purpose, if it is proved beyond doubt, that stoning to death has been practised, as a measure of punishment, to a free, sane, mature and married man or woman professing the faith of Islam, when the charge of adultery was successfully proved. The following instances of the **Sunna** will

throw ample light upon the fact that **rajm** has been recognised and practised as a measure of punishment in case of married partners :

(1) Abu Omamah reported that Osman-b-Affan ascended on a high place on the day of the Door and said : I recite to you in the name of Allah. Don't you know that the Messenger of Allah said : It is not lawful to take blood of a Muslim except for either of three things : fornication after marriage, or infidelity after Islam or murder of a person without right and he is to be killed in his place. By Allah, I have not committed fornication neither in the Days of ignorance nor in Islam, nor have I turned a retrograde since I took allegiance to the Messenger of Allah, nor have I killed any person whom Allah has made unlawful; so on what account will you put me to death.[84]

Ayesha reported that the Messenger of Allah said : It is not lawful to take the blood of a Muslim who bears witness that there is no deity but Allah and that Mohammad is the Apostle of Allah except for either of three things : Fornication after marriage as he is subject to stoning to death, a man who comes out fighting with Allah and His Prophet as he shall be killed, hanged or banished from the land; or one who kills a soul and then he shall be killed for it.[85]

The case of Ma'az-b-Malik has been an authentic one accepted by all the Muslim Jurists, wherein it is retold that the Prophet ordered the sentence of stoning to death when Ma'az confessed his crime during four different appearances. Similar are said to be the instances of Ghameda, and Mager-al-Aslami.

While these traditions are to be found in **Siha Sitta**, the six widely read and well accepted books on **Hadith**, the four Imams

84. (25:45) Tirmizi, Nisai, Ibn Majah, Fuzlul Kareem, *Al-Hadis*, p.509-10.
85. Abu Daud; (25:79) Fazlul Kareem, *Al-Hadis*, p.525-26.

of the Sunni school of jurisprudence, *viz.*, Abu Hanifa, Shafaii, Malik, Ahmed-b-Hambal are all agreed upon the fact that the punishment for fornication, if the partner is married, is nothing but **rajm.**

It may, therefore, be concluded that arguments favouring **rajm** as a measure of punishment to a married partner are sound and logical in contrast to those arguments opposing it, since the only basis of the latter school of thought is nothing but a verse of the Qur'an, which too, peculiarly enough, does not contradict the former school of thought in explicit terms.

### (9) Mode of executing Lapidation :

It is necessary, when a whoremonger is to be stoned to death, tnat he should be carried to some barren place, void of houses or cultivation; and it is requisite that the stoning be executed, first by the witnesses, and after them, by the Imam or Qadi and then by the rest of the by-standers. Shafaii has said that the witnesses beginning the stoning is not a requisite, in a case of lapidation any more than in a case of scourging. If the witnesses shrink back before the commencement of lapidation, the punishment drops, because their reluctance argues their retraction. In the same manner punishment is remitted when the witnesses happen to die or to disappear as in such a case the condition of the commencement of lapidation by the witnesses, is defeated. This is when the whoredom is established upon the testimony of the witnesses: but when it is established upon the confession of the offender, it is then requisite that the lapidation be executed first by the Imam or the Qadi and after them by the rest of the multitudes, because it is so recorded from Ali. It is said that the Prophet threw a small stone like a bean at Ghameeda who had confessed whoredom.

### (10) The execution of stoning is not suspended on account of sickness :

If a sick person, being one whose proper punishment is lapidation, commits whoredom, he is to be stoned because his destruction is due, and is, therefore, not to be suspended on account

of his illness; but if he be one whose punishment is scourging, the execution of it must be deferred until his recovery, lest life should be endangered, for the same reason as the limb of a sick thief is not cut off until he be in a proper habit of body to endure the amputation without sickness of life.[86]

**(11) The execution of stoning is to be suspended on account of pregnancy :**

If a pregnant woman commits fornication and her punishment be lapidation, the execution must be delayed until her delivery, for if she were to be stoned whilst pregnant, the child would be destroyed in her womb; and if her punishment be scourging, the execution must be deferred until she shall have recovered from her labour, as that is a species of sickness, wherefore a delay must be made until her health be perfectly restored: contrary to a case of stoning, where the punishment need not be delayed until a perfect recovery, since the delay in this case is only with a view to the preservation of the child in her womb, which is separated from her upon the instant of its birth. It is recorded from Abu Haneefa that in stoning also the execution must be delayed until the child becomes independent of her care, in case there should be no other person to foster it in her stead, because by this delay the child is preserved from destruction; and it is, moreover, related that when Ghameeda, after her delivery, came before the Prophet, that he might execute punishment upon her, he said to her "Go and remain until such time as your child is independent of you.[87] If a pregnant woman be convicted of whoredom upon evidence, she must be confined in prison until she be delivered, lest she should abscond; contrary to a case where a pregnant woman is convicted upon her own confession for in this case she is not to be confined as her denial after confession must be credited, (for which reason punishment is remitted in case of her denial) wherefore to imprison her would be useless.

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86. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.17.
87. *Ibid.*, p.18.

**(12) Stoning and scourging cannot be united :**

It is not lawful to unite the punishments of stoning and scourging in the same person, because the Prophet has left no precedent of the kind; and also, because if they were to be united, the scourging would be useless since the design of correction is a warning from vice, and this warning is effected by lapidation in respect only to others than the person so punished; for a warning cannot be effected, with respect to the person punished after his destruction.

**(13) Scourging and banishment cannot be done with respect to a woman :**

If a woman guilty of whoredom be of mature age, scourging and banishment cannot be united in her punishment.[88] According to Shafaii, these two may be united with respect to her by way of punishment, that is banishment may also be included in her punishment because the Prophet has declared "If a man being unmarried, commits whoredom with a woman who is of age, the punishment of such is one hundred stripes; and he shall be excluded from the city for the space of one year, as by his banishment the door is shut against whoredom, because in an unsettled situation a man meets with few female companions to tempt him to commit it."[89] The arguments of the Hanafi Jurists are two-fold : first God has declared "the whore and the whoremonger shall ye scourge with a hundred stripes",[90] from which it is evident that the sole punishment of such a crime is one hundred stripes, for if it were more, it would be there mentioned, and one hundred stripes alone would not have been declared sufficient; Secondly, her banishment is opening the way to the further commission of her crime, because people are under less restraint when removed from the eye of their friends and relations, as those are the persons whose censures they are most

88. Al-Marghinani, *Al-Hedaya,* translated by Charles Hamilton, Vol.II o.p.cit., p.16.
89. *Ibid.*, p.16.
90. Qur'an 24:2.

in dread of : moreover, in an unsettled situation and among strangers, the necessaries of life are procured with difficulty, whence she might be induced voluntarily to prostitute herself for a supply, which of all kinds of whoredom is the most abominable.

### (14) A slave to receive fifty stripes :

If a person convicted of whoredom be a slave, male or female, the punishment of such is fifty stripes, because the Almighty has said (in the Qur'an) speaking of female slaves :

فعليهن نصف ما على المحصنت من العذاب ۔ (قرآن)

They shall be subject to half the punishment of free married people.[91]

and the term slave in the text extends to males as well as females; moreover as bondage occasions the participation of only half the blessing of life, it also occasions the suffering of only half the punishment, because an offence increases in magnitude in proportion to magnitude of blessings under the enjoyment of which it is committed.

### (15) Slaves cannot be punished for whoredom but by authority :

A master cannot inflict correction upon his male or female slave for whoredom, but by the permission of the Qadi. But Shafaii has said that it belongs to a master to inflict correction upon his slaves because a man's authority over his slaves is general and absolute, even preferably to that of the Qadi as a master is empowered to perform acts with respect to his slaves in which the Qadi is not empowered; this, therefore, is the same as **tazeer**, or discretionary correction; that is to say, the master is at liberty to inflict stated punishment for whoredom upon his slaves and in the same manner as discretionary correction. The arguments of the Hanafi Jurists are two-fold; First, the Prophet has declared that there

91. Qur'an 4:25.

are four things committed to Magistrate, and that one of those is **hadd**, or stated punishment, which is here treated of; Secondly, **hadd** or stated punishment is a right of God, as the design of it is to purify the world from sin, and as it is a right of God, hence it cannot be done away by the act of any individual, wherefore this right is to be exacted by the Prince, as the deputy of the law or by the Qadi, as the deputy of the Prince, contrary to **tazeer** or discretionary correction, because that is a right of the individual, whence it is that infants are subject to **tazeer**, although they be not liable to **hadd**.

## *Chapter - IV*

# MEASURES TO CHECK FORNICATION UNDER ISLAMIC LAW

Having studied till now the concept of chastity and the penal laws of Islam with special reference to **hudood** as also the detailed penal provisions of the Islamic legal system in regard to fornication, we shall now proceed to see the various measures provided for in the religion of Islam for checking fornication.

It might be interesting to note that Islam proceeds on a two-thronged way to enforce its provisions of law. The first one is to address the 'self' ( نفس ) and to inculcate in him those traits that would smoothen the way of treading its prescribed path. And the second method is to invoke the sovereign authority of the State which is a repository of power. No fixed ratio as such, has, however, been fixed as between the two; the State's powers and its intervention increasing as and when the will power of the citizens weakens and the State's intervention decreasing when the cumulative effect of the citizen's will power to follow a prescribed course assumes greater proportions. Besides this common feature of the Islamic system, one would also notice, particularly in regard to the prevention of crime, that Islam attempts at the creation of such an atmosphere as would minimise the chances of commission of crimes. And for this purpose, Islam goes to prescribe both positive as well as negative measures. This is the rule rather than exception in respect to those crimes which are considered graver and heinous in the eye of law. And if a citizen commits an offence despite the presence of such measures, Islam strikes a hard blow at the offending citizen so that it might serve as a deterrent to the law-abiding persons.

Fornication is one such heinous crimes in the eye of Islamic legal system. Islam has, therefore, prescribed both positive as well

as negative measures to check the prevalence of this evil. We shall study in detail what these steps are and how they function to achieve the desired object of Islamic legal system.

## I. POSITIVE STEPS :

Some of the positive steps as prescribed by the Islamic legal system to check fornication comprise of a pursuation to marriage, permission for a restricted polygamy and the system of bond-maids. Islam regards the desire to satisfy one's lust as a natural and fundamental necessity of every man and woman. But at the same time, Islam puts certain restrictions on the manner in which it can be satisfied. Sexual intercourse *per se*, is not condemnable rather it is regarded as an **ibadat**, *i.e.*, piety. (form of submission to the will of God). But when this takes illegal forms, Islam abhors them and prescribes dire punishments in these cases. In the preceding Chapter, we have studied in detail, the measures of punishment to such forms of illicit cohabitations. We shall now have a glance at the society, Islam foresees and conceives of for minimising the possibilities of pre-marital and extra-marital sexual behaviour.

### (1) Marriage :

The institution of marriage is as old as the human civilisation. Family is the basic unit of any human society and the way in which a family comes into existence is by the union of two opposite sexes for procreation and two souls for love. A family is well organised or ill-organised according as the way in which it takes its shape, say, through the familiar and recognised common methods of uniting two bodies in a given civilisation or through unfamiliar and un-recognised methods. And marriage is the name given to that recognised and commonly accepted form of union, in which a male and a female members of the society jointly undertake to form themselves into an association called family and to bear, in their own relative spheres, the consequential duties and responsibilities cast upon them. Marriage subsists so long as the contract of association is not repudiated by either of the two contracting parties. It is natural

that when the association no more remains in tact, the agency that brought it into existence would dissolve automatically.

The institution of marriage thus permits and legalises sexual pleasure and cohabitation between two persons of the opposite sex. The man and the woman who were strangers before, assume at once the status of a husband and a wife. Human society whose basic unit is the family, has always disapproved any sexual intercourse without one's assuming the status of a husband or a wife. Whatever might be the forms of attaining such a status, all sexual intercourses without this status, have been abominable in any human civilisation and those unrecognised and illegal cohabitations have been termed fornication or whoredom or adultery.

The objects of marriage might have been different with different civilisations but we find one thing in common among them all. And the common factor is the disapprobation of illegal forms of copulations and unions between the sexes. It is the reason why marriage has always been recommended as an important step to check fornication. In all probability, man may take to illegal forms also to satisfy his lust inspite of his having a legal partner to quench his thirst, but the degree and extent of such criminals would far be lessened when compared to a situation where such legal partnership does not exist. The view of St. Paul as set forth in the first Epistle to the Corinthians adds strength to the above argument. He says "It is good for a man not to touch a woman. Nevertheless, to avoid fornication, let every man have his own wife, and let every woman have his own husband.[1] According to Islamic Philosophy of marriage, it does not only legalise intercourse and children and provide for exclusive possession and communion between man and woman, but also protects the purity of life of both the sexes. The Qur'an exhorts the believers, "the unmarried among you shall enter into marital tie."[2] The last Prophet of Islam once said, "O young men! He among you who can afford to meet the expenses

1. I Cor. vii 1-9 as quoted by Betrand Russel, in *Marriage and Morals*, London 1970, p.27.
2. Qur'an (24:32)

The jurists have, however laid down the following rules :[8]

When the sexual passion is so strong that there is every possibility of a man falling into the pit of fornication, marriage becomes **fard** (binding). When sexual passion is very strong, marriage is **wajib**. When the passion remains in normal degree, it is **Sunnat-e-Muakkadah**. Marriage becomes **Makruh** (abominable) when there is no means for maintenance. In case when injustice is sure, marriage is **haram** (unlawful).

### (i) Muslim concept of Marriage :

Whether limitation of free love and free intercourse by means of marriage is for the ultimate benefit of human development and progress of human civilisation or not, it is for the sociologists and the moralists to dwell upon. For our purpose, it is sufficient to make a study of the way in which this institution has been dealt with by the Muslim Jurists.

A Muslim marriage, according to Islamic law, is a civil contract based on mutual consent of the contracting parties and is in contrast to the sacramental form of marriage. Most of the incidents of contract are consequently applicable to a marriage too, for example, consideration of marriage in the form of dower, breach of the contract by divorce or similar other forms, conferring of legal rights and duties on the contracting parties and bestowing no greater power on the husband than what the contract provides for in a lawful manner.

"Marriage", says the author of **Ashbah**, "is an institution ordained for the protection of the society, and in order that human beings may guard themselves from foulness and unchastity.."[9]

"No sacrament but marriage has maintained its sanctity since the earliest time (Lit. the days of Adam). It is an act of '**ibadat**' or piety for it preserves mankind free from pollution.."[9]

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8. Fazlul Kareem, *Al-Hadis,* o.p.cit., p.632.
9. Amir Ali, *Mohammadan Law*, o.p.cit., p.315.

"Marriage when treated as a contract is a permanent relationship based on mutual consent on the part of a man and a woman between whom there is no bar to a lawful union.."[10]

"It does not give the man any right over the person of the wife except for mutual relationship according to the law of nature and no contrary to it. This is clearly laid down in the Badaya.."[10]

"Marriage", according to Hedaya, "is allowed between two people of different sexes to whose mutual cohabitation there is no natural or legal bar or prohibition. For example, a man cannot marry a hermaphrodite nor any woman within the degrees prohibited by Divine law..."[10]

Marriage is a legal process by which the sexual intercourse and procreation and legitimation of children between man and woman is perfectly lawful and valid.[11]

Marriage is a contract which has for its design or object the right of enjoyment, and the procreation of children.[12] Hence marriage (**Nikah**) is a permanent civil contract, which comes into immediate effect, made between two persons of opposite sexes, with a view to mutual enjoyment and procreation and legalising of children and to give birth to a family.

Marriage is obligatory on a person whose passions cannot otherwise be restrained from the commission of wrong or from hankering after what has been prohibited, and who can provide the dower and maintenance of the wife. But it is not sinful for one to abstain from it if he is content and has no means. If two people of different sexes inter marry with the object of guarding themselves from foulness and unchastity and procreating children and raising them up tenderly, the act is pious. If it is only for self-indulgence, the act is not pious.[13] "Marriage is a contract which has for its object

10. Amir Ali, *Mohammadan Law*, o.p.cit., p.315.
11. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.71.
12. Neil B.E. Baillie, *Digest of Mohammadan Law*, 1957, Lahore, p.4.
13. Amir Ali, *Mohammadan Law*, o.p.cit., p.316.

the procreation of children." **Kifaya**, a celebrated treatise on **fiqh**, lays down that it is one of the original necessities of man, **al-Hawaij-ul-aslia**, instituted for the good ordering of life. It is, therefore, lawful on the part of an old man, **Shaik-ul-Kabir** or who has no hope of off-spring, and even in the last or death illness.[14] It may be concluded that the Islamic law has ordained the institution of marriage sanctioning thereby sexual relations between two members of the opposite sexes with a view to the preservation of the human species, the fixing of decent, restraining men from debauchery, the encouragement of chastity and the promotion of love and union between the husband and wife and of mutual help in earning livelihood.[15] We shall now make a brief study of the requisites of marriage in the Islamic legal system in order to appreciate whether this institutions is within the reach of one and all.

### (ii) Constitution of the Marriage :

The pillars of marriage, as of other contracts, are **ijab wa qabul**, (declaration and acceptance). This first speech, from whichever side it may proceed, is the declaration, and the other, the acceptance.[16] Marriage is contracted by means of declaration and consent, both expressed in the preterite.[17] According to **Hawi-ul-Kudsi**, it is not necessary that the proposal should always precede assent, or that the proposal should come from one side particularly. So long as there is intelligent assent to the proposal for a permanent contract, it is valid. The declaration and acceptance, or, in other words, proposal and consent, may be expressed in any language known to the parties.[18]

### (iii) Consent in marriage :

No contract can be said to be complete unless the contracting

14. *Kifaya*, Vol.III, p.577.
15. *Taudih*, p.71.
16. Neil B.E. Baillie, *Digest of Mohammadan Law*, o.p.cit., p.4.
17. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.II o.p.cit., p.72.
18. Mafatih, *Fatawai, Alamgiri*, Vol.I, p.382.

parties understand its nature and mutually consent to it. A contract of marriage also implies mutual consent, and when the parties see one another, and of their own accord, agree to bind themselves, both having the capacity to do, there is no doubt as to the validity of the marriage. It is unlawful to oppress or coerce a woman into marriage or to obtain her consent by force or coercion, or to compel her to marriage.[19] As under the English law[20] consent to the marriage obtained from the woman by fraud or compulsion has no effect, and the marriage is not valid.[21]

**(iv) Capacity to contract marriage :**

The validity of a marriage under the Islamic law depends primarily on the capacity of the parties to marry each other. As a general rule, it may be remarked, that under the Islamic law the capacity to contract a valid marriage vests on the same basis and depends on the same conditions as the capacity to enter into any other contract.

In the first place the parties must be able to understand the nature of the act. For, if either of them is **non compos mentis** or is incapable of understanding the nature of the contract, it is void. In the second place they must be adult (in case where the marriage is not contracted for them by their guardians), and in the third place they must be acting of their free will and not under compulsion.

Among the conditions which are requisite for the validity of a contract of marriage according to Fatawai Alamgiri[22] are :

(i) understanding;

(ii) puberty; and

(iii) freedom in the contracting parties, with the difference that while the first requisite is essentially necessary for the

19. *Durrul Mukhtar,* cited by Amir Ali, *Mohammadan Law* o.p.cit., p.316.
20. *Scott V. Sebright,*56, LJ P.II SC 12 PD 21; *Clarke Steer v. Clarke*, 65 LTP 13.
21. Amir Ali, *Mohammadan Law*, o.p.cit., p.352.
22. *Fatawai Alamgiri,* Vol.I, p.377.

validity of the marriage, (as a marriage cannot be contracted by a **majnoon, non compos mentis** or a boy without understanding) the other two conditions are required only to give operation to the contract, as the marriage contracted by a minor (boy or girl) possessed of understanding is dependent for its operation on the consent of the guardian.

(iv) Equality of the status of a bridegroom with that of a bride is generally regarded in Islam for the future stability of the marriage, though it is not legally sanctioned by Islamic law. It is only a recommendatory one.

**(v) Guardianship for purposes of marriage:**

Guardianship for purposes of marriage is allowed because of necessity, for a proper and suitable match may not always be available.[23] But when a minor is given in marriage by a guardian other than the father or the grand-father, he or she can, in the exercise of what is called the option of puberty, **Khvarul-bulugh**, refuse to be bound by the marriage and ask the Court to pass a decree annulling the marriage. This absolute option does not exist in the case of a marriage contracted by the father or the grand-father, in whose favour the law assumes a presumption that they must have acted in the best interest of the minor.[24]

**(vi) Testimony to the Marriage :**

Under the Shia and the Maliki doctrines, the validity of a marriage does not depend on the presence of witnesses, while under the Hanafi law it is a necessary condition.[25] Under Hanafi rule the witnesses must not only be present at the time of the execution of the contract, but they must also know of its actual terms. They must also be able to speak to the identity of the persons from whom the

23. Al-Marghinani, *Al-Hedaya*, translated by Charles Hamilton, Vol.III o.p.cit., p.173
24. *Ibid.*, p.135.
25. *Ruddul-Mukhtar*, Vol.II, p.444.

proposal and consent respectively emanated. If a woman were so concealed or veiled that neither of the witnesses could recognise her, or was able to tell whether she or any other female in the room gave the consent, their testimony would not be sufficient.

**(vii) Qualification of the witnesses :**

There are four requisites to the competency of the witnesses, *viz.*, freedom, sanity, puberty, and profession of the Muslim faith.[26] Hence marriage is not contracted in the presence of a slave, and insane person, nor of minors nor of infidels, when the marriage is between Muslims. If the husband be a Muslim and the wife a Zimmeeah, their marriage may be contracted with two zimmees for witnesses, whether they be of the same or a different faith from the wife.

**(viii) Performance of ceremonies not essential to a valid marriage :**

The legal incidents of marriage in Islam are remarkable for their extreme simplicity.[27] Marriage may be constituted without any ceremonial functions; there are no special rites, no proper afficiants, no irksome formalities. The essential requirements are offer, **eejab**, and acceptance, **qubul**. In India as well as in other Muslim countries, many local forms have become associated with the performance of the matrimonial contract. The validity or invalidity of a marriage, however does not depend, in any way, on the performance or non-performance of the forms and ceremonies that have been engrafted on Muslim manners and customs by contract with outside races.[28]

Legally a marriage contracted between two persons, possessing the capacity to enter into the contract is valid and binding, if entered into by mutual consent, in the presence of two witnesses. As already stated, the Shia law dispenses

26. Baillie, *Digest of Mohammadan Law*, p.6.
27. Asaf A.A. Fyzee, *Outlines of Mohammadan Law*, III Ed., p.87.
28. Amir Ali, *Mohammadan Law*, p.334.

even with the latter provision. "When a man," says the **sharaya,** "has declared himself to be the husband of a woman and she has assented to the truth of the declaration, or when a woman has declared herself to be the wife of a man, and he has acquiesced therein, they are judged to be ostensibily married."[29]

### (ix) Legal effects of the Marriage :

Marriage confers important rights both on the husband and the wife against each other, subject to any special stipulations which the parties might have entered into at the time of marriage or afterwards. It legalises the mutual enjoyment of the parties in a manner permitted by law or according to nature. It subjects the wife to the power of restraint that is, it places her in such a condition that she may be prevented from going out and showing herself in public. The husband cannot however refuse to see her relatives. It imposes on the husband the obligation of mehr or dower, and of maintaining and clothing his wife. It establishes on both sides the prohibitions of affinity and rights of inheritance. It obliges the husband to be just between his wives, in case of his having more than one wife, and to have due regard to their respective rights; while it imposes of them the duty of obedience when called to his bed, and confers upon the husband the power of correction when the wives are disobedient or rebellious. It enjoins on him the propriety of associating familiarly with them with courtesy and kindness. Whatever property a wife had at the time of marriage remains absolutely her own and at her disposal and she is under no disability to acquire properties by reason of converture. That is to say a woman's legal capacity is, in no way affected by marriage, except as regards contracting conjugal relations with others.

This discussion on the requisites of a valid marriage in Islamic law, though seemingly appears to be not so related with the topic, provides an opportunity to the reader to understand and appreciate

29. Asaf A.A. Fyzee, *Outlines of Mohammadan Law.*, o.p.cit., p.334.

the simplicity and easiness with which it can be contracted in a Muslim society. The idea behind it seems to be to create a situation where the legal course to sexual intercourse by means of marriage is made, as far easier as possible.

Again it is also noteworthy that by declaring, that marriage is **not** a sacred bond indissoluble and unterminable for all times, Islamic law throws open the course to repudiate the marriage contract, though with much disliking, when the contracting parties find it difficult, for obvious reason, to continue the wed-lock. Thus a situation where persons, though married, remain practically unmarried, due to family disorganisation is avoided and the parties are set at liberty to choose a new match of their own choice and liking instead of continuing in a stand-still state of marital tie without an opportunity to enjoy sexual pleasure and all possibilities, on the other hand, to seek it otherwise, in an illegal manner. It is better to wreck the unity of the family than to wreck the future of the parties by binding them to a companionship which has become odious. Again membership of a family founded on antagonism can bring little profit even to the children. Islamic law, therefore, recognises divorce and other forms of dissolution of marriage as a necessary evil.

## II. POLYGAMY:

The second positive step provided for in the Islamic legal system to check fornication, is the permission for a man to have contemporaneously four wives subject to certain conditions and limitations. We have till now discussed how the simple system of contracting marriage including its repudiation in the Islamic legal system go together in creating an atmosphere where a man and a woman, can, should they so desire, lead a life of purity and chastity without finding themselves under a compulsion to seek illegal relations outside the wed-lock. The second step relating to polygynous marriages now deserves consideration to see how far it goes in preventing the crime of fornication in an Islamic society.

### (1) The meaning of Polygamy :

The term **Polygamy**, is most conveniently used as a generic

term to include all such cases other than monogamy; its different forms are polygyny, in which one man marries more than one woman, polyandry in which one woman marries more than one man and communal marriage, in which more than one man marries more than one woman. The union of one husband and two or more wives is known as **polygyny** and popularly this is called **polygamy**, but this is incorrect for **polygamy** means multiple mates and applies to both **polygyny** and **polyandry**.[30]

Among all Eastern nations of antiquity, **polygamy** was a recognised institution. Its practice by royalty, which every where bore the insignia of divinity, sanctified its observance to the people.[31] It was prevalent among ancient Medes, Babylonians, Assyrians, and Persians, with no restriction as to the number of wives a man might have. **Polygamy** existed among the Israelites before the time of *Moses*, who continued the institution without imposing any limit on the number of marriages which a Hebrew husband might contract. In later times the *Talmud* of Jerusalem restricted the number by the ability of the husband to maintain the wife properly[32] and though the *Rabbins* counselled that a man should not take more than four wives, the Karaites differed from them and did not recognise the validity of any limitation.

Among the Athenians, the most civilised and most cultured of all the nations of antiquity, the wife was a mere chattel, marketable, and transferable to others, and a subject to testamentary disposition. She was regarded in the light of an evil, indispensable for the ordering of the house-hold and procreation of children. An Athenian was allowed to have any number of wives, and *Demosthenes* gloried in the possession by his people of three classes of women, two of whom furnished the legal and semi-legal wives.[33]

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30. *Encyclopaedia, Americana*, Vol. 18 1966, New York Art. 'Marriage' by Harvey J. Lock and James A. Petasm, p.312.
31. *The Spirit of Islam*, Ed.1904, p.183.
32. Eben Maezer : Code Rabbinique, Vol.I, p.45.
33. Dollinger: *The Gentile and the Jew*, II, pp.233-238.

Among the Romans, also, polygamy flourished in a more or less pronounced form until forbidden by the laws of Justinian.[34] But the prohibition contained in the Civil law, effected no change in the moral ideas of the people and polygamy continued to be practised.

Morganatic and left-handed marriages were not confined to the aristocracy. Even the clergy, frequently for getting their vows of celibacy, contracted more than one legal or illegal union.[35] St. Augustine himself seems to have observed in it no intrinsic immorality or sinfulness, and declared that polygamy was not a crime where it was the legal institution of a country. The German reformers, as Hallam points out, even so late as the sixteenth century admitted the validity of a second or a third marriage contemporaneously with the first, in default of issue and other similar causes.[36]

The practice of polygamy among the Vedic Indians is abundantly proved by direct reference in the Rigveda and other texts, though in the main, monogamy is recognised as normal. In the case of the king four wives are expressly mentioned; the **mahisi**, the first wedded, the **Parivakli**, or discarded (apparently one who bore no son), the **Vavata**, or favourite, and the **Palagali**, who is explained as the daughter of one of the Court officials. In the **Arthashastra**, the Smritis, and the **Epic**, a rule is laid down that a man may have wives, from his own caste and each of those below his, either including or excluding the shudras, and in such cases, the wife of the same caste was the wife **par excellence**, with whom the husband performs religious duties. The heroes and Brahmins of the **Epic** are frequently represented as having several wives but one of them always ranks first.[37]

Though the ethical view of Christianity does not recognise any form of marriage except monogamy, but we could come across that in the Church of Jesus Christ of later day saints (Mormans), and

34. Gibbon : *Decline and Fall of the Roman Empire*, Vol. IV, p.206.
35. Ameer Ali, *Mohammadan Law*, o.p.cit., p.23.
36. *Spirit of Islam*, o.p.cit., p.395.
37. *Encyclopaedia of Religion and Ethics*, o.p.cit., p.452.

the heretical sect of **Anabaptists** (16th Century) polygyny was legally practised in Europe and accepted by the Christian Church in the middle ages and it occurred sporadically as a legal institution accepted by the Church and the State till the middle of the Seventeenth Century.[38]

Among the ancient Arabs and the Jews, there existed besides the system of plurality of wives, the custom of entering into conditional as well as temporary contracts of marriage. These loose notions of morality exercised the most disastrous influence on the constitution of the society within the Peninsula.

Islam condemned in toto polyandry and communal marriages. It restrained polygyny by limiting the maximum number of contemporaneous marriages and by making equitability towards all, obligatory on the man. The Qur'an permits a Muslim to marry not more than four wives at a time which may, for our purpose, be termed, quadrogymy.

The Qur'an says :

> "....marry of the women, who seem good to you, two, or three, or four, and if ye fear that ye cannot do justice (to so many) then one (only), or (the captives) that your right hands possess. Thus it is more, likely that ye will not do injustice.[39]

It is noteworthy that the verse of the Qur'an which contains the permission to contract four contemporaneous marriages, is immediately followed by a sentence which cuts down the significance of the preceding passage to its normal and legitimate dimensions. The former sentence says you may marry two, three or four wives but not more. The subsequent lines declare, "but if you cannot deal equitably and justly with all, you shall marry only one". The extreme importance of this proviso, bearing specially in mind the meaning which is attached to the word 'equity' (**adal**), in the Qur'anic

38. *Encyclopaedia of Britanica*, USA, 1965, Vol.14, p.947.
39. Qur'an 4:3.

teachings, has not been lost sight of by the great thinkers of the Muslim world.[40] The reason why quadrogyny has been permitted for its believers by the Islamic legal system may be attributed to the strictness with which it views the crime of fornication and the stringent punishment it prescribes for a transgressor of this penal law. The law-giver makes it abundantly clear that the laws of Islam are based on human nature :

> "So set thy purpose (O, Mohammad) for religion as a man by nature upright - the nature (framed) of Allah, in which He hath created man. There is no altering (the laws of) Allah's creation (nature).[41]

Man, by nature, is leaned towards polygyny. The compulsion of circumstances and the consequential responsibilities of a second marriage, restricts the desire of a man from entering into a contract of second contemporaneous marriage. In his book on "the Evolution of Marriage and Family", Ch. Letoourrean contributes to the above-said proposition and remarks that a man is by instinct, willing to have a plurality of wives; but quite often he is compelled to bow down before the necessities of family life.[42] Havelock Ellis quotes Lord Morley, in his treatise on "Studies in the Psychology of sex, as saying that man, by instinct, is in favour of polygyny.[43] *George Reley Scott*, an authority on sex, observes in his book "History of Prostitution" (page 21) that basically a male is favourably leaned towards polygyny and the progress of civilisation further increases this instinct of polygyny in man.

Islam, it seems, does not look at polygyny in contrast to monogamy, for both are permitted, rather than latter is considered an ideal, should a person be content with one wife. Islam, on the other hand, views polygyny in contrast with fornication which is abominable and strictly forbidden in the Islamic legal system. Since man, by nature is leaned to have more than one wife at a time to

40. Ameer Ali, *Mohammadan Law*, o.p.cit., p.24.
41. Qur'an 30:30.
42. P.153 Ed.III.
43. Vol.II Part III, p.495.

quench his thirst of lust or may be, for several other reasons, the alternative is either to permit polygyny wherein sexual intercourse with several women assumes a legal form with all the obligations of a valid marriage; or to forbid polygyny and enforce strict monogamy, conniving, at the same time, concealed and hidden sexual intercourses with women, not one's wife, that is to say, without binding them in a legal wed-lock. Islam abhors the latter situation and allows the former, putting at the same time, certain restrictions upon the person willing to have more than one contemporaneous wife.

Even in countries where polygyny is strictly prohibited we find man's nature resorting to various illegal methods. Prostitution and debauchery have become a common feature in those countries. Monogamy has thus become a farce and the practical situation is nothing short of polygyny. Professor *Hart* points out :

> "In most common law jurisdiction it is a criminal offence for a married person during the life-time of an existing husband or wife to go through a ceremony of marriage with another person, even if the other person knows of the existing marriage. The punishment of bigamy not involving deception is curious in the following respects. In England and in many other jurisdictions where it is punishable, the extra-marital sexual cohabitation of the parties is not a criminal offence. If a married man cares to cohabit with another woman—or even several other woman—he may do so with impunity so far as the criminal law is concerned. He may set up house and pretend that he is married : he may celebrate his union with champagne and a distribution of wedding cake and with all the usual social ceremonial of a valid marriage. None of this is illegal but if he goes through a ceremony of marriage, the law steps in not merely to declare it invalid but to punish the bigamist.[44]

44. H.L.A. Hart : *Law Liberty and Morality*, Oxford 1969, pp.39-40.

*Max Mondan* says with authority in his book "Conventional lies of Civilisation" (page 301)[45] that despite the implementation of monogamy by law in the civilised nations, man is actually in a state of polygyny. Rarely can we find a person out of one lakh males, who can say on his death bed that he did not have contacts with more than one woman during his entire life. *James Hilton* admits in the "Marriage Commission Report, X-rayed"[46] that the coercive implementation of monogamy has led to the several vices of prostitution. It has resulted in mutual hatred and quarrels. It has increased enmity among women and confined the marital love to the bodily relation only. The result is, willing co-operation, chastity and purity have turned themselves into moral corruption." *Lebon* a French Expert on sex, remarks in his book, the case of polygyny that "the return to polygyny - a natural relation between the sexes would close the door to several ills and evils. Thus prostitution, venereal diseases, AIDS, abortion, the difficulty of illegitimate children, the misfortunate of lakhs of unmarried woman, which is the result of unequal number of the two sexes, fornication and enmity, could be put to end to". The Marriage Commission Report - X-rayed[47] quotes the famous Theosophist, Mrs. *Annie Beasant* thus : "In the West we find a false and exhibitory monogamy. In fact, there exists polygyny without any responsibility. When a man is fully satisfied with a mistress, she is thrown out to become a woman of the street, because her lover does not undertake any responsibility of her future. She thus becomes hundred times worse than a guarded wife and mother of a polygynous family".[48]

Again the scheme of Islamic law goes to suggest that Islam aims at legislating keeping in view the limitations and weaknesses of the common average masses and does not confine its legal provisions in such a manner as to suit the ideal ones of the society alone. May be, monogamy can be said to be an ideal to be practised by ideal persons. But admittedly, all in a given society,

45. As quoted by Hamid Ali, *Taadudh Azdawaj*, Delhi 1964, p.95.
46. P. 268.
47. Pp.273-274.
48. Hamid Ali, *Ta'adudh Uzdawaj*, p.138.

are not ideal persons. Therefore, if monogamy were to be the rule, those who are not ideal, would have no other go but to resort to free sexual pleasure and illegal cohabitation, rather go to the extent of resorting to unnatural methods of satisfying their lust. As discussed earlier, the desire to have sexual pleasure more than one wife is not an unnatural phenomenon. In such a case the question for consideration is whether to have strict monogamy and licentiate unrestricted and irresponsible contacts with the prostitutes, brothels, call-girls and mistresses or to permit polygyny and close the door for such illegal sexual pleasures with no consequential responsibilities.

We may thus conclude that the object of permitting polygyny in Islam is nothing but to shut the doors of fornication since it is difficult to expect of every man to observe strict monogamy and as never to indulge in sexual pleasure with more than one woman. This is of particular significance when viewed in the light of the several social problems, such as the large number of females over males in a given society, the natural incapacity of the female folk to satisfy man's lust at regular intervals because of her monthly menses and post-natal periods, infertility to give birth to children which men so much desire for the non-availability of good matches for all the women, the problems of widows and orphans and several such other factors.

To say that man has no inclination towards more than one wife is to reject both experience and observation, human history and human psychology. This is the reason why Rom Landan in his Book "Sex Life and Faith" says that the evidence of history and science compels us to admit the situation of polygyny in all sincerity.

### (2) System of Bond-Maids :

Under polygyny, it would be appropriate to discuss the status of bond-maids (slave girls) as found in the Islamic legal system. The modern term commonly used for a bond-maid of Islam is, concubine, which does not, however, convey a true sense of the concept of slave girl in a Muslim Law.

The institution of conjugal relations with bond-maids, which for our present purpose, may be termed, though obscure, as 'concubinage' is as old as human civilisation. It originated out of the slaves captured after victory in a war between two clans, tribes or nations. The female slaves were distributed by the chief among the soldiers and those who got a share of these slave girls had a right to sell them away or retain them and enjoy sexual pleasure with them without, however, conferring on them, the status of a wife. Such a status of the war captives was a necessary phenomenon of the early civilisation.

Among the ancient Hebrews, most of the wives of the patriarchs possessed hand-maidens or slaves which they frequently gave to their husbands. Sarah gave her maid, Hagar to Abraham, Rachal gave her maid, Bilhal to Jacob and Leah gave her maid Zilpha to Jacob.[49] The Biblical names for the bond-maids are **amah**, Siphah and Pileges.[50]

Concubinage was legitimate and respected in the city states of Historical times.[51] The custom was also prevalent among other early people and its recognition is a distinct step in the history of civilisation.[52]

In Rome under the Republic the status of concubines although differed from that of a wife was legitimate. Under Augustus the status of concubine was protected by a special legislation. Thus among the Romans concubinage was neither unlawful nor disgraceful[53] and was considered as an inferior state of marriage.[54]

The laws of later middle ages in different States of Spain recognised concubinage under the name of 'Burragania', the contract being life long, the woman obtained a right of maintenance

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49. Ralpha de Pomarai - *Marriage Past, Present and Future*, p.86.
50. E. Neufeld - *Ancient Hebrèw Marriage Laws*, p.121.
51. *Encyclopaedia of Social Sciences*, p.172.
52. Hamsworth - *Universal Encyclopaedia*, Vol.IV, p.2194.
53. *The Encyclopaedia Americana* (1951), Vol.VIII, p.475.
54. *Encyclopaedia Britanica*, (1959) p.213.

during life and sometimes also to a part of the succession and the sons ranking as nobles if their father was a noble.[55] In Iceland the concubine was recognised in addition to the lawful wife, though it was forbidden that they should dwell in the same house.[55] In Scotland, the laws of Williams, the Lion, (1214 A.D.) speak of concubinage as a recognised institution and in the same century the English legist Bracton treats '**concubina legitima**' as entitled to certain rights.[55] In the Danish Code of Vlademar II, which was in force from 1280 A.D. to 1683 A.D., it was provided that a concubine kept openly for three years shall thereby become a legal wife.[55]

In China the institution of concubinage existed from ancient times. The Chinese husband was having besides the legal wife, 'so-called wives' by courtesy or lawful concubines.[56] In Japan, concubinage of the Chinese type existed as a legal institution until it was abolished with promulgation of the Criminal Code of 1880 A.D. But the long established custom still lingers to some extent.[56]

In India from earliest times the institution of concubinage is well established in the Hindu society and was prevalent even in the Vedic period. **Dharmasastras** have recognised it as a lawful practice and have given concubine a status in law. Under the express ordinances Hindu law-givers have made provision for the right of her maintenance for life after the death of her paramour.

Under Hindu Law connection with a concubine was considered as lawful. The connection was open and legal. There was nothing illicit about it. The only point in which it differed from marriage was that while the latter was solemnized according to Shastras with particular formalities under one of the forms of marriage, the connection of concubinage was informal. According to Hindu, law-givers concubinage is a connection with concubine or **Dasi** (female slave) which has been referred to by them as an '**Avaruddha Stree**'. It should not be forgotton that '**Dasi**' only

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55. *Encyclopaedia Britanica*, (1959) p.213.
56. Westermarch - *Short History of Marriage*, p.232.

denotes a permanent concubine and does not include public woman or adulteress. The term '**Dasi**' cannot be taken in the strict literary sense but means a woman kept as a concubine, the connection being continuous, exclusive and lawful.[57]

Yajnavalkya[58] has classified concubine into two types: (1) Avaruddha and (2) Bhujasya. **Avaruddha** is a concubine who is kept in the house itself and forbidden to have intercourse with any other person, whereas **Bhujasya** is a concubine who is not kept in the house but elsewhere and is in the special keeping of a person. According to Mitakshara[59] **Avaruddha stree** means one who is prohibited by the master from intercourse with any other person with an injunction to stay at home with the object of avoiding any lapse of service, whereas **Bhujasya** means a mistress who is restrained from intercourse with other persons (other than Swami or Master).

Thus according to Dharmastras a concubine has been given a recognised status as if she were the wife of her paramour. She is "almost a wife" according to ancient authorities.[60] The concubine under Hindu law might not be having the same status as that of a wife, but that status is very akin to it.[61] And in the days when very high concept of morality was prevalent in the Hindu society and extraordinary importance was attached to chastity of woman, a relationship of concubine with her paramours was not considered as immoral. She was never considered as unchaste woman even by sages.

The idea behind this system of slave-maids seems to be tie up a woman of lower or little status, to a single person, instead of allowing her to become the woman of the street, a prostitute, or a call-girl. A study of the Islamic legal system reveals that the law of **Sharia** has legalised sexual intercourse with a slave-maid without

57. Kane - *History of Dharmastras*, Vol.III, p.602.
58. Yaj. (II-290)
59. *Mitakshara* II, Section I, pp.27,28.
60. *Nagubai v. Moghibai,* 50 Bom. 604 P.C.
61. *Shivkumari v. Udaya Pratap Singh*, AIR 1947 All. 314.

the necessity of entering into a contract of marriage with her. The Qur'anic verse in this regard runs thus :

> "Who guard their private parts except before their mates (legally married wives) or those whom their right hand possesses and (slave-maids), for which they are not blamed worthy. But whosoever seeks to go beyond that, these are they, that exceed the limits.[62]

From the above verse, it can be deduced that two categories of women are exempt from the general rule of safe-guarding one's own private parts. The first category is of **Azwaj**, meaning those with whom a legal marriage has been contracted, the second category relates to those who are under lawful and exclusive possession of a person. ما ملكت ايمانهم The basis of permission for conjugal relations with this second category of women is not marriage, but **possession**. The following rules have been set down by the Muslim Jurists with regard to the attainment of bond-maids and enjoyment of sexual pleasure with them.[63]

(1) Bond-maids are women who are captured during war; no soldier can have sexual intercourse with them. All captive women will be handed over to the Government and the Government have the right :

(i) either to release them; or

(ii) to take compensation from them; or

(iii) to get them exchanged with those Muslim prisoners of war, who have been captured by the enemy; or

(iv) to distribute them among the soldiers.

A soldier can have sexual relation with a slave-maid only after her being given possession of by the Government.

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62. Qur'an 23:6.

63. Abul Ala Moududi, *Tafhimul Qur'an*, Part I, 13th Ed., 1971 Jan., pp.339-341 (Qur'an 4:24).

(2) An Army commander cannot *suo-motu*, permit his soldiers to pacify their sexual desire temporarily or for the time being with the women prisoners of war. Such an act is entirely unlawful and there is no difference between adultery and such a permission and adultery is a grave crime according to Islamic law.

(3) Even after such possession, no sexual relation can be had with such a girl unless she has monthly course of her menses so that it can be established that she is not conceiving. It is illegal to have intercourse with her before such a satisfaction about her pregnancy. In case she is pregnant, no intercourse is permissible until her delivery.

(4) The soldier to whom a slave-girl is allotted by the Government, sexual relation is permissible for him irrespective of the faith and the religion of the bond-maid. Of course, the person to whom she is allotted alone can have sexual relation with her. No other person has a right to touch her unless and otherwise she is sold away by her owner or freed and married. Her children will be legitimate children of the man in whose possession she is and they will enjoy the same legal rights which are prescribed by Islamic law for other children. Once a slave girl begets children she cannot be sold to any other person and as soon as the possessor dies, she automatically becomes a free woman.

(5) Just as other rights of possession are transferable so also the rights of a person over the possession of war captive are also transferable.

(6) In case a slave girl is given in marriage to another person, then the original possessor can extract other services from her, but he cannot have sexual intercourse with her.

(7) There is no such restriction of number in respect of slave girls as does exist in case of wives. This does not, however, mean that the intention of Islamic law was to encourage wealthy persons to purchase innumerable slave-girls thereby making their homes a house of sexual pleasure and merry-making, but the

reason for not putting any restriction on the number of slave girls can only be ascribed to the uncertain conditions of war at a given time.

(8) Bestowing the right of possession by Government is as lawful as the act of marriage contract.

(9) After allotting a slave girl to a person, the Government ceases to have power to take her back in the same manner as a guardian of a woman cannot take her back after once giving her in marriage. The slave-maid cannot, however, redeem her status in the same manner as a wife, since no contract did ever exist to give rise to the power of redemption.

## II. NEGATIVE STEPS :

We have discussed at length, certain positive measures as advocated by the Islamic legal system that go to contribute a long way in the creation of an atmosphere in which a person can satisfy his natural thirst for sexual passion in a legal manner, without finding himself under compulsion to take to illegal course. The simplicity of consummation of marriage, the easier methods of their dissolution in case of family disorderliness, the permission of restricted polygyny and the safeguard of the chastity of a women of lower status or of a different nation taken as prisoners of war, are all contributory factors, whose cumulative effect is an environment wherein man cannot, unless and otherwise, perverted complain of limited scope and fewer and difficult ways of satisfying his natural urge for copulation in a legal manner.

We may now have to look at the negative measures, as prescribed in the Islamic legal system, that go to help a Muslim Society in minimising the chances of illicit sexual relations whether pre-marital or extra-marital. Since chastity and purity of the sexes are upheld as the pristine values of life by the religion of Islam, its legal aspect zealously guards against simple act that may ultimately lead, or may possess potentialities to lead, to tarnish the chastity, and adulterate the purity of the sex.

## (1) Satr-e-Aurat :

The first injunction of Islam in this direction is **satr-e-aurat** viz., the proper concealment of those parts of human body that need to be covered at all times. **Satr**, literally means that part of the human body which is indecent to be seen and must, therefore, be covered always. If **satr** is not properly covered, it amounts to nakedness. The **satr** of man according to Islamic law is that part of his body which lies in between his lower knees and naval. And the **satr** of a woman is her entire body except the face and her two hands (hands - commencing from the wrists). The general direction is that both the sexes should guard those portions of their bodies as constituting **satr** against their exposure before every one except their spouses. There are certain exceptions, however, such as dire necessities and compelling circumstances as for medical treatment etc. Some of the sayings of Prophet Mohammed in regard to **satr** are given hereunder :

> Muhammad-b-Jahsh reported that the Messenger of Allah passed by Ma'mar while his thighs were exposed, He said : O Ma'mar, cover your thighs, and verily and the two thighs are private parts.[64]
>
> Ibn Omar reported that the Messenger of Allah said : Take care of nudity, because there are those[65] with you, who will not separate from you except near privy and when a man goes unto his wife. So be ashamed of them and honour them.[66]
>
> Abu Sayeed reported that the Messenger of Allah said: No man shall look to the private parts of a man and no woman to the private parts of a woman, nor a man shall be with another man under the same cloth, nor a woman with a woman under the same cloth.[67]

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64. (387w) Sharhai Sunnat, *Al-Hadis*, p.696.
65. These are said to be Angels.
66. (27:129) Tirmizi, *Al-Hadis*, p.693-94.
67. (27:118) Muslim, *Al-Hadis*, p.691.

Ibn Masud reported from the Prophet who once said, a woman is a private part.[68] On another occasion the Prophet explained his companions that the **satr** of a woman consists of her entire body excluding the two hands commencing from the wrists and the face.

The Qur'an says in this regard :

"O, children of Adam! We have revealed unto you raiment to conceal your shame, and splendid vesture."[69]

يٰبَنِيٓ اٰدَمَ قَدْ اَنْزَلْنَا عَلَيْكُمْ
لِبَاسًا يُّوَارِيْ سَوْاٰتِكُمْ وَرِيْشًا ؕ
(قرآن)

This verse exhorts every human being to conceal those parts of his body which, by nature, one would be ashamed of to expose before others.

These directions of concealing **satr** or nudity from others are meant to shut the first door of one being attracted towards the other with a lustful passion.

**(2) Privacy and touch :**

The second injunction of Islam as a preventive measures against illicit cohabitation is that a male, other than the husband, shall not remain with a woman in privacy. The Prophet of Islam is reported to have said :

> Jaber reported from the Prophet who said : Don't visit women whose husbands are absent, because the devil runs through you the running of blood.[70]
>
> Oqbah-b-A'mer reported that the Messenger of Allah said : Be careful of coming to women. A man asked : O, Messenger of Allah, inform (me) about husband's

68. (27:123) Tirmizi, *Al-Hadis*, p.692.
69. Qur'an 7:26.
70. (27:131) Tirmizi *Al-Hadis*, p.694.

> brother he said : Husband's brothers are (as it were) death.[71]
>
> Ayesha reported that the Messenger of Allah went to her while there was a man near her. He, as it were, disliked it. She said : He is my brother. He said : See your brothers, because suckling is on account of hunger.[72]

Similarly one who is not another's husband should not touch her either privately or publicly. The Prophet once said :

> "One who touches the hand of a woman not his wife, will have fire put upon his palm on the day of judgment."[73]

Old ladies who have no passion or a touch of sex are, however, exempt from the above said general rule. Saving a drowning woman or one caught in fire or for medical treatment, one can, however, touch a stranger woman or man as the case may be, though not his/her spouse. The only idea behind these instructions, is to avoid prevalence of such circumstances as may lead slowly to evil ways, culminating ultimately into **zina** or fornication.

### (3) Istezan :

Islam sets great a value on the privacy (Istezan) of home life. In the first place going into houses without permission is strictly forbidden. The Qur'an says :

> "O ye who believe! Enter not houses other than your own without first announcing your presence and invoking peace upon the folk thereof. That is better for you, ye may be needful.[74]

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71. (27:120) Agreed *Al-Hadis*, p.691-92.
72. (27:128) Agreed *Al-Hadis*, p.693.
73. Takmela-e-fathul Qadeer, Abul Ala Moudadi, '*Parda*', p.319.
74. Qur'an 24:27.

The Qur'an requires the men folk to ask anything of the women folk from behind a curtain:

> "And when ye ask of them (the wives of the Prophet) anything ask it of them behind a curtain).[75]

Qur'an further directs the inmates even not to enter into private apartments all of a sudden without any signs of alarm and prior permission so that they may not see others in a state in which they ought not to see them:

> "O ye who believe! Let your slaves, and those of you who have not come to puberty, ask leave of you at three times (before they come into your presence) : Before the prayer of dawn, and when ye lay aside your raiment for the heat of noon and after the prayer of night: Three times of privacy for you. It is no sin for them or for you at other times, when some of you go round attendant upon others (if they come into your presence without leave). Thus Allah maketh clear the revelations for you. Allah is knower, wise."[76]

The purpose behind these injunctions is to safeguard the house-wives from the sight of the strangers. That is the reason why the Prophet once said :

> "If a person peeps into the house of another without permission, the house owner have right to injure his eye and take away his eye sight.[77]

These orders apply *mutatis mutandis* to the house-hold servants. *Fathima* once gave her child to *Bilal* and *Anas* from behind the curtain, though they were both the close associates and serving boys of the Prophet.[78]

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75. Qur'an 33:53.
76. Qur'an 24:58.
77. Muslim Ch. Tahrimun Nazn Tibait.
78. Fatahul Quadeer cited Abul Ala Moudadi, '*Parda*', o.p.cit., p.318.

### (4) Ghazze Basar (Lowering of Gaze) :

The Qur'an says :

"Tell the believing men to lower their gaze and be modest...."[79]

"And tell the believing women to lower their gaze and be modest....."[80]

In these verses the Qur'an exhorts every man and woman to have their looks cast down and to have their private parts guarded from being attacked or violated.

To the same effect are the following traditions of the Prophet:

Jarir-b-Abdullah reported : "I asked the Prophet about the glance at a stranger woman. He ordered me to turn away my glance."[81]

Ibn Mas'ud reported from the Prophet who said : "A woman is (like) a private part. When she goes out, the devil casts glance at her."[82]

*Boraidah* reported that the Messenger of Allah said to *Ali* : "O *Ali*! Don't allow your glance to follow a glance, because the first is for you, and the other is not for you."[83]

The above traditions show that the first sight by chance at a stranger woman is lawful, but the next sight is unlawful. This direction of **ghazze basar** is also aimed at putting a check upon the lustful man and woman from falling into a trap of the devil, who according to Islam, runs with the running of blood in the human body and seeks every opportunity to tempt man to transgress the limits of Allah and to violate the laws of Islam.

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79. Qur'an 24:30.
80. Qur'an 24:31.
81. (27:122) Muslim, *Al-Hadis*, p.692.
82. (27:123) Tirmizi, *Al-Hadis*, p.692.
83. (27:124) Ahmed, Tirmizi Abu Daud, *Al-Hadis*, p.692.

## (5) Hijab (Seclusion) :

Yet another important preventive measure adopted by the Islamic legal system for preventing the crime of fornication is **hijab** or seclusion.

The Qur'an says :

> "O ye, wives of the Prophet! Ye are not like any other women. If ye keep your duty (to Allah) then be not soft of speech, lest he in whose heart is a disease aspire (to you), but utter customary speech.[84]

The rule in this verse is addressed to the wives of the Prophet but still is meant for all Muslim women in order to give life to the women folk and to promote purity of heart and chastity of the sexes. They are not forbidden to speak to men but as a safeguard to all possible inclinations of the heart and to evil thought, they are asked not to indulge in soft and anormous conversation with the opposite sex, who is stranger.

At another place, the Qur'an addressed the Prophet of Islam in the following manner :

> "O Prophet! Tell thy wives and thy daughters and the women of the believers to draw their cloaks close round them (when they go out). That will be better, so that they may be recognized and not annoyed. Allah is ever forgiving, Merciful.[85]

The Arabic word '**Yudhneen**' derived from **Idhna'at** literally means "to keep a part of the **chader** (covering cloth) over one's body. The Urdu word '**ghunghat**' is akin to this term. The meaning conveyed in this passage is to cover the face. (No matter in what manner it is). The advantage is said to be that such Muslim women would be easily recognized as being modest and respectful and may not be teased by the eves'-teasers.

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84. Qur'an 33:32.
85. Qur'an 33:59.

The following traditions of the Prophet of Islam add strength to the above deduction that a woman should veil her face in the presence of a stranger:

> *Omme Salamah* reported that she and *Maimanah* were near the Prophet when *Omme Maktum* came to him. The Prophet said : "Screen from him." I asked : "O Messenger of Allah, is he not a blind man, who does not see us?" The Holy Prophet said : "Are you blind, and do you not see him".[86]

> *Anas* reported that the Prophet came to *Fatimah* with a slave whom he gifted to her. There was a piece of cloth over *Fatimah*; when her head was covered with it, it did not reach up to her legs; and when her legs were covered with it, it did not reach her head. When the Messenger of Allah saw what she was throwing, he said : There is no sin for you therefor. He is your father and (he is) your slave.[87]

> *Jaber* reported that *Omme Salamah* sought permission of the Messenger of Allah for cupping. He ordered *Abu Tayabah* to cup her. He said : "I thought that he is her foster brother or a boy not yet grown up."[88]

A '*mahrim*' lady one in the state of Ihram during *Haj*, shall not put on her veil over the face and gloves over her hands. The Prophet forbade women from using veil or hand-gloves while in *Ihram* during Haj.[89]

المحرمة لاتنتقب ولاتلبس القفازين ونهى النساء فى احرامهن عن القفازين والنقاب - (الحديث)

86. (27:130) Ahmed, Tirmizi, Abu Daud *Al-Hadis,* p.694.
87. (27:132) Abu Daud *Al-Hadis*, pp.694-95.
88. (27:121) Muslim, *Al-Hadis,* p.692.
89. Abu Dawood, Mu'atta and Tirmizi as quoted by Abul Ala Moudadi in '*Purdah*' (1970, Delhi, p.351).

The above direction of the Prophet prohibiting women in *Ihram* during Haj, from wearing hand gloves or putting on veils, also go to suggest that the womenfolk were otherwise using them at their common public appearances.

The law of Sharia, however, makes certain exceptions in regard to the above general provisions of veiling or observing purdah.

While the general rule is to cover the whole body the exception is, ( الّاماظهرمنها ) that which appears by itself. It suggests that a woman may expose her face out of necessity. This exposure shall not be to display one's beauty but only for any work necessitating such uncovering. For example, a woman may be required to appear before a Judge in the capacity of a witness or a party to the case. For medical treatment, she may be required to get herself examined by a male Doctor. If her life is in danger on account of her being caught in fire or drowning and in the saving of her life, men-folk may have to catch hold of her and lift her out. In all such cases the law permits a Muslim man and woman to set aside the above-said general instructions of observing purdah.

**(6) Intermingling of the two sexes :**

Free intermingling of the two sexes without any restriction in Clubs, hotels and other social functions has created numerous social problems specially in western countries. *Edward Patey* rightly points out that free intermingling of the two sexes is one of the factors which creates premarital sex relations among unmarried young people in the Western countries. He says :

> "Boys and girls are thrown together into each others company as never before. No longer does convention protect the girl from the predatory male. She can spend all evening with him in an empty house, go cycling with him into the country, go youth hotelling or butlineering with him in holidays, and few comments are made within this free and easy atmosphere, natural sex

> interest isfanded by advertisement television programmes, and paper back books and journals. In recent years a number of advertisement for beer and cigarettes have hinted that these commodities were a useful aperitif or aftermath to fornication.[90]

Islam allows intermingling of the two sexes for the religious purposes, such as for congregational prayers in the mosque and at the time of Haj pilgrimage. On such occasions, when intermingling becomes necessary, the Qur'an requires the women to appear in their simplest dress and to wear an over-garment which should cover the face, limbs and their ornaments, at the same time requiring both sexes to keep their looks cast down. Unnecessary mingling of the sexes such as in clubs, hotels, and other social functions, is discouraged. The Prophet prohibited a woman being alone in private with a man who is not her near relative, **dhu mahram** (a person with whom marriage is prohibited).[91] But when other people are also present, or one is exposed to public view, there seems to be no harm in being alone with a woman.[92]

The Prophet once said :

> *Jaber* reported that the Messenger of Allah said : Behold! a man must not pass a night near a married woman who had consummation, except his being husband, or within the prohibited degrees.[93]

The following tradition related elsewhere in the preceding paras also prohibits a man and a woman being alone together :

> *Oqbah-b-A'mer* reported that the Messenger of Allah said: Be careful of coming to women. A man asked: O Messenger of Allah inform (me) about husband's (brothers) He said: Husband's brother are (as it were) death.[94]

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90. Edward Patey, *Young People Now*, London, 1964, p.35.
91. (Bu:67:112) cited by Mohd. Ali *the Religion of Islam*, o.p.cit., p.661.
92. (Bu: 67:113) *Ibid.*
93. (27:119) Agreed, Fazlul Kareem, *Al-Hadis*, o.p.cit., p.691.
94. (27:120) Agreed, *Al-Hadis*, supra, p.691-692.

The object before Islam appears to be to raise the moral status of society and to minimize the chances of illicit sexual relations growing up between the sexes. Hence the free intermingling of the two sexes has been prohibited in Islam.

### (7) Use of Intoxicants :

The use of intoxicating liquors was prohibited during the period of Madina and the earliest revelation on this point runs as hereunder :

> "They question thee about strong drink and games of chance. Say: in both is great sin, and (some) utility for men; but the sin of them is greater than their usefulness.[95]

This was the first stage in the prohibition of wine, but it was more of a recommendatory nature as it only says that the disadvantages of the use of intoxicating liquors preponderate over their advantage. The next stage was that in which the Muslims were prohibited for coming to mosques while drunk:

> "Oye who believe! Draw not near unto prayer when ye are drunken, till ye know that which ye utter....."[96]

And finally intoxicating liquors were definitely forbidden in the following verse :

> "O ye who believe! strong drink and games of chance and idols and divining arrows are only an infamy of Satan's handiwork, leave it aside in order that ye may succeed.[97]

As wine is prohibited on account of its intoxication, it is stated in the Hadith that every intoxicant is prohibited. The sayings of the Prophet in this regard are as follows :

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95. Qur'an 2:219.
96. Qur'an 4:43.
97. Qur'an 5:90.

*Ibn Omar* reported that the Messenger of Allah said : Every intoxicant is wine and every intoxicant is unlawful.[98]

*Jaber* reported that a man came from Yeman and asked the Prophet about wine of corn called **Mizr** which they drank in their land. Prophet said : is it intoxicating? 'Yes' said he. He said : Every intoxicant is unlawful.....[99]

*Abdullah-b-Amr* reported that the Messenger of Allah prohibited intoxicants, games of chance, card playing and Gobairah (a kind of wine) and he said : Every intoxicant is unlawful.....[100]

*Jaber* reported that the Messenger of Allah said : What intoxicates in greater quantity is unlawful also in its small quantity.[101]

From the above traditions, it is clear that all sorts of intoxicants, whether in small quantity or large are forbidden. The modern intoxicant drugs, such as Marijuana, LSD (Lysergic Acid Diethylamide) Amphetamines, Methedrine and Heroin, which are commonly used by the **Hippies**,[102] come under the same definition of intoxicants and hence prohibited. Not only drinks but the sale preparation, and every sort of transaction of intoxicants are also prohibited by Islam.

The Prophet says : "Wine is the mother of all sins."[103] There is no sin such as rape, adultery and fornication which a drunkard cannot commit when he loses his sense and wisdom and thereby his power of control and self-restraint and lets loose the God of

98. Mus. 25:148, *Al-Hadis*, p.568.
99. Mus. 25:150, *Ibid* 568.
100. Abu-Daud (25: 162) *Ibid* 571.
101. Tir. (25:155) *Ibid* p.570.
102. Robert K. Martin, Robern Nisbet, *Contemporary Social Problems*, Ed.III, U.S.A., pp.203-213.
103. Qur'an 26:225, 226.

cupid to satisfy his sexual luxury. This perhaps, is the reason why wine drinking is considered a step towards woman seeking and forbidden, among others, for this reason too.

**(8) Poetry, music and dance :**

**(i) Poetry:**

The Qur'an says as to the poets :

> "Hast thou not seen how they stray in every valley, and how they say that which they do not.[104]

Those poetries which deal with immorality and frivolous love episodes and eulogy of polytheism were banded by this verse. It might be interesting to note that poetry as such is not prohibited altogether. On being enquired about poetry, the Prophet once said : The good of it (poetry) is good and the bad of it is bad.[105] On another occasion he said : the believer fights with his sword and tongue. By Him in whose hand there is my life, it is as if you (Poet) are throwing at them the throwing of an arrow.[106]

Good poetries were admittedly by the Prophet to contain great wisdom :

> "*Obai-b-Ka'ab* reported that the Messenger of Allah said : Verily there is wisdom in Poetry.[107]

The Prophet himself has certain poets under him, namely *Hasan-b-Sabet, Abdullah-b-Rawwahah* and *Kaab-b-Malak*, to satirise the unbelievers in their very face.[108] Only such of those poetic songs as are romantic and an appeal to the sex with descriptions such as beauties of the fairer sex, are forbidden since they arouse the passions of young men and women and lead them towards sexual crimes.

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104. Qur'an 26:225, 226.
105. Fazlul Kareem, *Al-Hadis*, o.p.cit., p.184.
106. *Ibid.*
107. Agreed (12:2) *Al-Hadis*, p.187.
108. *Al-Hadis*, p.186.

**(ii) Music :**

Music stands on the same footing with poetry. As noted earlier "the good of it is good and the bad of it is bad.[109] There is, however, a great difference of opinion among principal Jurists with regard to the legality or otherwise of music. **Quazi** *Abu Tayyab Tabari* holds it as unlawful along with *Imam Malik, Imam Shafaii, Abu Hanifa* and *Sufyan Sauri* while *Hammad* took the mean view and maintained that it is **Makruh** (abominable) bordering on illegality. *Abu Talib Makki, Imam Gazzali* and some modern Jurists held it as lawful on the basis of the sayings and doings of some of the companions of the Prophet like *Abdullah-b-Jafar, Abdullah-b-Zubair, Mugirah-b-Shubah* and *Muwayiah.* They were followed by *Ataa, Junaid* and *Abul Hasan-b-Salam.*[110]

The Prophet says : "He who has got no music within himself is a man of hard heart and the remotest of men from Allah is the hard heart.[111]

The Prophet said : Allah heard nothing (sweeter) than what he heard from the Prophet- his singing with the Qur'an.[112]

Immoral musical songs having a tendency towards misguidance and immorality are unlawful :

> *Abu Omamah* reported that the Messenger of Allah said : None raised up his voice with but Allah sent for him two devils upon his shoulders who beat his chest with their heels till he stopped.[113]

Not only the immoral songs are prohibited but the buying, selling and training the singing slave-girls are also strictly prohibited by Prophet:

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109. *Al-Hadis*, p.194.
110. Fazlul Kareem, *Al-Hadis*, p.194.
111. *Ibid*, p.194.
112. *Ibid*, p.195.
113. Tibrani, 284w, *Al-Hadis*, p.202.

> *Abu Omamah* reported that the Apostle of Allah said: Sell not singing girls, nor buy them, nor train them, and their price is unlawful.[114]

Innocent songs also become unlawful when sung by grown up girls in the midst of men because they have greater probability of rousing up passions. Similar is the case with young beardless boys who sing in the midst of women and girls or in the midst of immoral men.[115] In this sense, organised singing and band parties as in cinema and theatres and bioscopes, or in thousand other performances are unlawful, because there are men and women present there whose passions are roused by the shows and because they contain generally love-songs and love pictures.

**(iii) Dance :**

When the very appearance of an adult girl without **purdha** is prohibited in Islam, the question of ladies participation in dancing drops automatically. Again since music and poetry provoking passions of men and women are also forbidden as discussed above, dance which is usually combined with these prohibited objects is equally forbidden. The reason for the prohibition of these objects is obvious. The Islamic legal system views with contempt illicit sexual intercourse. It prescribes severest punishments for a person violating the provisions of this law. It is, therefore, but natural that Islamic law forbids all those objects that have the slightest tendency or the minutest potentiality to lead the believers towards violation of the strict injunctions about sexual intercourse.

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114. Tirmizi 12:21, *Ibid*, p. 199.
115. Durre Mukhtar, as quoted by Fazlul Kareem, *Al-Hadis*, o.p.cit., p.199.

## *Chapter - V*

# INDIAN LAW RELATING TO ADULTERY AND OTHE ILLICIT CO-HABITATIONS

Fornication, as such, has not been prohibited in the Indian law. A man can have sexual intercourse with an unmarried maiden, if she being of age over sixteen years, consents to such co-habitation. Nay, a person may cohabit with a married woman too, provided her husband takes no objection to such an intercourse. The Indian law intervenes only when a married woman is fornicated without the consent or connivance of her husband or when a maiden is ravished by coercion without her consent. The Indian law also steps in when prostitution assumes the form of a commercialised vice, that is, an organised means of living. Conversely, prostitutes or prostitution is not *per se* a criminal offence. The Indian law also takes cognizance of certain unnatural offences pertaining to homo and hetero-sexual behaviour, such as, for example sodomy, buggery and bestiality. We will examine hereunder the various penal provisions of the Indian law in regard to the above-said sexual offences :

## I. RAPE :

Section 375 of the Indian Penal Code defines rape, and the punishment for the offence is enumerated in Section 376 thereof. The sections run thus :

### *Section 375 :*

A man is said to commit 'rape' who, except in the case hereinafter excepted, has sexual intercourse with a woman under circumstances falling under any of the five following descriptions :

*Firstly* : Against her will.

*Secondly* : Without her consent.

*Thirdly* : With her consent, when her consent has been obtained by putting her in fear of death, or of hurt.

*Fourthly* : With her consent, when the man known that he is not her husband, and that her consent is given because she believes that he is another man to whom she is or believes herself to be lawfully married.

*Fifthly* : With or without her consent, when she is under sixteen years of age.

*Explanation* : Penetration is sufficient to constitute the sexual intercourse necessary to the offence of rape.

**Exception** :—Sexual intercourse by a man with his own wife, the wife not being under fifteen years of age is not rape.

***Section 376 :***

Whoever commits rape shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to ten years, and shall also be liable to fine, unless the woman raped is his own wife and is not under twelve years of age, in which case he shall be punished with imprisonment of either description for a term which may extend to two years, or with fine, or with both.

*Ingredients* : The section requires two things :

(1) Sexual intercourse by a man with a woman.

(2) The sexual intercourse must be under circumstances falling under any of the five clauses of the section.

It is no defence that the woman consented after the act.[1]

**(1) Passive non-resistance or consent obtained by fraud :**

If a girl does not resist intercourse in consequence of misapprehension, this does not amount to a consent on her part. Where a medical man, to whom a girl of fourteen years of age was sent

1. 1 Hawk, p.c. c.16.s.7, p.122.

for professional advice, had criminal connection with her, she making no resistance from a *bona fide* belief that he was treating her medically, it was held that he was guilty of rape.[2] The accused, who was engaged to give lessons in singing and voice production to a girl of sixteen years of age, had sexual intercourse with her under the pretence that her breathing was not quite right and that he had to perform an operation to enable her to produce her voice properly. It was held that he was guilty of rape.[3] Consent of a woman to sexual intercourse obtained by putting her in fear of death or of hurt is no defence to an accused person for an offence under this section. Where a woman was willing to allow sexual intercourse with her for a price, the fact that the price offered was found to be fictitious, would not vitiate the consent.[4]

(a) **Exception** : There may be cases in which the check of the law may be necessary to restrain men from taking advantage of their marital rights prematurely. Instances of abuse by the husband in such cases will fall under this clause.

*Explanation* : The only thing to be ascertained is whether the private parts of the accused did enter into the person of the woman. It is not necessary to enter into any nice discussion as to how far they entered.[5]

(b) **Exception** : A man cannot be guilty of rape on his own wife when she is over the age of fifteen years on account of the matrimonial consent she has given which she cannot retract. But he has no right to enjoy her person without regard to the question of safety to her.[6]

### (2) Indecent assault is not attempt to commit rape :

Indecent assault upon a woman does not amount to an attempt to commit rape, unless the Court is satisfied that there was a

2. *William's* case, (1850) 4 Cox 220.
3. *Williams*, (1923) 1 KB 340.
4. *Motiram*, (1954) Nag. 922.
5. *Allen*, (1839) 9 C&P 31.
6. *Huree Mohun Mythee*, (1890) 18 Cal. 49.

determination in the accused to gratify his passion at all events, and inspite of all resistance.[7]

The presumption of English law that a boy under 14 years of age is under a physical incapacity to commit the offence of rape has no application to India.[8]

## II. UNNATURAL OFFENCE :

Section 377 of the Indian Penal Code deals with the definition as well as punishment for the offence. The section runs as follows:

***Section 377 :***

Whoever voluntarily has carnal intercourse against the order of nature with any man, woman or animal, shall be punished with imprisonment for life, or with imprisonment of either description for a term which may extend to 10 years and shall also be liable to fine.

*Explanation* : Penetration is sufficient to constitute the carnal intercourse necessary to the offence described in this section.

This section is intended to punish the offence of sodomy, buggery and bestiality. The offence consists in a carnal knowledge committed against the order of nature by a man with a man, or in the same unnatural manner with a woman, or by a man or woman in any manner with an animal.

The crime is complete if the Court is satisfied that penetration took place.[9] The offence made punishable under this section requires that penetration, however little, should be proved strictly. Thus an attempt to commit this offence would be an attempt to thrust the male organ into the anus of the passive agent. Some activity on the part of the accused in that particular direction ought to be proved strictly. Where there was an intention on the part of the

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7. *Shanker*, (1881) 5 Bom. 403.
8. *Paras Ram*, (1915) 37 All. 187.
9. *Robert Reekspear*, (1832) Mood.342.

accused to satisfy his lust by a carnal intercourse against the order of nature, and he made every preparation to satisfy that lust, but before he could thrust his organ in, he spent himself, it was held that he had not done any act which might be construed as an attempt to commit the offence of sodomy.[10]

## III. ADULTERY :

Section 497 of the Indian Penal Code gives the definition and punishment of the offence of adultery. The section runs as follows:

### *Section 497 :*

Whoever has sexual intercourse with a person who is and whom he knows or had reason to believe to be the wife of another man, without the consent or connivance of that man, such sexual intercourse not amounting to the offence of rape, is guilty of the offence of adultery, and shall be punished with imprisonment of either description for a term which may extend to five years, or with fine or with both. In such case the wife shall not be punishable as an abettor.

### (1) General Comment :

This section defines the offence of adultery in a special narrow sense, as having carnal knowledge of a married woman with knowledge or reasonable belief that the woman was married and without the consent or connivance of her husband. The offence can only be charged against man, the woman being exempt from punishment as an abettor, and of course, as an adulteress. But the man may be married or unmarried though the woman he ravishes must be married, for if she is unmarried, he commits no offence by the mere fact of having sexual intercourse with her.

### (2) Ingredients :

The section requires the following ingredients :

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10. *Nowshirwan Irani,* (1934) 36 Cr.LJ 718, 28 SLR 330.

(i) Sexual intercourse by a man with a woman who is and whom he knows or has reason to believe to be the wife of another man.

(ii) Such sexual intercourse must be without the consent or connivance of the husband.

(iii) Such sexual intercourse must not amount to rape.

The Law Commissioners have limited the cognizance of this offence to adultery committed with a married woman, and the male offender alone has been made liable to punishment. Thus, under the Code, adultery is an offence committed by a third person against a husband in respect of his wife. It is not committed by a man who has sexual intercourse with an unmarried woman, or with a widow, or even with a married woman whose husband consents to it. In Section 488 of the Code of Criminal Procedure, the word 'adultery' is used in the wide and ordinary sense of voluntary sexual connection between either of the parties to the marriage and some one, married or single, of the opposite sex other than the offender's own spouse. It is used in the popular sense of the term, *viz.*, a breach of the matrimonial tie by either party.[11]

**(3) Why wife not punished as abettor :**

The authors of the Code say : "Though we well know that the dearest interests of the human race are closely connected with the chastity of women and the sacredness of the nuptial contract, we cannot but feel that there are some peculiarities in the state of society in this country which may well lead to humane man to pause before he determines to punish the infidelity of wives. The condition of the women of this country is, unhappily, very different from that of the women of England and France; they are married while still children; they are often neglected for other wives while still young. They share the attentions of a husband with several rivals. To make laws for punishing the inconstancy of the wife, while the law admits the privilege of the husband to fill his zenana with women, is a course

11. *Gantapalli Appalamma v. Gantapalli Yellayya,* (1897) 20 Mad. 470 (FB).

which we are most reluctant to adopt. We are not so visionary as to think of attacking, by law, an evil so deeply rooted in the manners of the people of this country as polygamy. We leave it to the slow, but we trust the certain, operation of education and of time. But while it exists, while it continues to produce its never failing effects on the happiness and respectability of women, we are not inclined to throw into a scale already too much depressed, the additional weight of the penal law."[12]

With regard to the provision running as, "has reason to believe to be the wife of another man" it may be noted that, it is not necessary that the adulterer should know whose wife the woman is, provided he knew she was a married woman.

**(4) Without the consent or connivance of that man :**

'*Consent*' here is a permission to the paramour on the part of the husband to have connection with his wife.

'*Connivance*' is the willing consent to a conjugal offence, or a culpable acquiescence in a course of conduct reasonably likely to lead to the offence being committed.[13] Connivance is an act of the mind, it implies knowledge and acquiescence. As a legal doctrine, connivance has its source and its limits in the principle, *volenti non fit injuria*, a willing mind, this is all that is necessary.[14] To constitute 'connivance' there must be something more than mere negligence; than mere inattention; that over-confidence; than dullness of apprehension; than mere indifference. It must be intentional concurrence.[15] Connivance is a figurative expression meaning a voluntary blindness to some present act or conduct, to something going on before the eyes, or something which is known to be going on without any protest or desire to disturb or interfere with it.[16]

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12. Note Q., p.175.
13. Stroud's Judicial Dictionary, Vol.I, p.374.
14. *Boulting v. Boulting*, (1864) 33 LJ (P.M.&A.) 81.
15. Per Sir John Nichol in *Rogers v. Rogers*, (1830) 3 Hagg.Ecc.57,59,
16. *Gipps v. Gipps*, (1864) 11 H.L.C.1; Munir, (1925) 24 ALJ 155, 27 Cr.LJ 101, (1925) AIR(A) 189.

"To establish connivance it is requisite, not that a party conniving should be actually an accessory before the fact, so as to have taken any active measure to bring about the result of adultery, but that he should be cognizant that such a result would follow from certain transaction that he approved of and consented to".[17] The mere fact that the husband, on being informed by the police that his wife had been discovered at a certain place, expressed his unwillingness to take her back on the ground that she had lost her religion, was not evidence of the husband having connived at her living a life of adultery with the accused.[18]

**(5) Such sexual intercourse not amounting to the offence of rape :**

In rape the consent of the woman is wanting. Under this section, the offence is committed even though the woman is a consenting party. In rape the woman may be a married woman or not, under this section the woman must be the wife of another man. Rape may be committed even by a husband when the wife is under fifteen years of age.

Adultery being an act which requires the consent of both the parties, it appears that for a man to be guilty of an attempt, it is not sufficient that he was found in a place in which adultery might have been committed and that he was minded to commit it.[19] Where a married woman went to visit a man, but before adultery was committed, she was taken away by her husband, it was held that the man could not be convicted of an attempt to commit adultery.[20]

**(6) Validity of section :**

The validity of Section 497 I.P.C. was challenged on constitutional grounds in the famous case of

17. *Glennie v. Glennie*, (1862) 32 LJ (P.M.&A.) 17, 20.
18. *Munir*, (1925) 24 ALJ 155, 27 Crl.LJ 101, (1926) AIR (A) 189.
19. *Basava Chary*, (1889) 1 Weir 569.
20. *Gulam Mohammad*, (1879) P.R.No.13 of 1879.

*Yousuf Abdul Aziz v. State of Bombay*[21] wherein the accused had the resourcefulness to challenge the validity of Section 497 itself on the ground that it discriminates against persons on grounds of sex. While a man is punishable under Section 497, a woman is not. A woman who has sexual intercourse with the husband of another is not punished, but a man who has sexual intercourse with the wife of another is punished. Is not that discrimination on grounds only of sex forbidden by Article 15? The Supreme Court pointed out in this case, speaking through Mr. *Justice Bose*, that under clause (3) of Article 15, the State may make special provision for women. On account of this saving provision, Section 497 could successfully run the gauntlet of the equality clause.

## (7) The aim and object of the section :

While discussing the aim and object of the section, Dr. Sir *Hari Singh Gour*, an authority on criminal law, pointed out that "The offence is held punishable not because of the connection it had with woman, but for the collateral purpose of preserving the peace and sanctity of family life."[22] It is however, open to question how the aim of "preserving the peace and sanctity of family life", could be achieved when the male partner is punished and the female partner is let off. *Ratanlal Ranchoddas* and *Dhirajlal Kishanlal Thakore* have opined in their comments on "The Law of Crimes", "the reasons given for not punishing a wife as an abettor seem neither convincing nor satisfactory. It would be more consonant with Indian ideas, if the woman also were punished for adultery. Manu has provided punishment for her, and even in France and in China she is punished."[23]

It is interesting to note that no such special provision or saving clause has been made available to the woman in the Indian Law of Crimes, except in Section 497 *viz.*, adultery. As regards Article 15(3) of the Constitution, the intention of the framers of the

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21. *Yousuf Abdul Aziz v. State of Bombay*, 1954, SC 321.
22. Dr. Sir Hari Singh Gour, *The Penal Law of India*, [illegible] ad, p.2584.
23. The Law of Crimes (1961) p.1270.

Constitution in giving concessions to woman and children appears to be, to safeguard the interests of the weaker sections of the population. And such a safeguard can be invoked for granting licence to the weaker and fairer sex in relation to the heinous offence of adultery, as observed by Justice *Bose*, does not, nevertheless, appeal to the bar of reason.

### (8) Provocation of the husband to kill the adulteress wife justified :

A person finding his wife and her paramour in *flagrante delicto* receives the highest provocation and, if he kills one[24] or both[25], he is entitled to the benefit of the exception to Section 300 (murder) of the I.P.C. *Parsons* and *Ranade*, JJ, remarked : "It has always been recognised that no higher provocation can be given than that of finding a man's wife in actual intercourse with a paramour.[26] The Court, therefore, treats such an offender with special clemency[27] and there are cases in which such offenders have been let off with short terms of imprisonment for 6 months[28] and in the case of a double murder, for one year.[29]

In the aforesaid judgments, wherein Exception-I to Section 300 of the I.P.C. has been invoked to mitigate the offence of murder, it can be seen that the Indian law suffers from a great lacuna in its treatment of the two great crimes of adultery and murder. That they are both heinous is out of question. While Section 497 I.P.C. exonerates the defaulting woman partner completely of any charge once the 'act' is completed, Exception-I to Section 300 I.P.C. views the 'act' in its actual working as a 'grave and sudden provocation' to enable the Court to treat the husband hurt with special clemency and to let him off for a single or double murder with just a year's imprisonment. It only suggests that the husband,

24. *Asha Gopal*, 1897, Unrep. Cr.C.932.
25. *Shaik Boodhoo*, 8WR 38.
26. *Asha Gopal*,1897, Unrep. Cr.C.932, *Ram Tahal Kahar* 3 BLR (AC) 33.
27. *Asha Gopal*, supra, *Shaik Boodhoo*, 8 WR 38 *Narayan Singh* 1930 L.172.
28. *Asha Gopal*, supra.
29. *Shaik Bhoodhoo*, supra.

for whom there can be no graver insult than the illicit cohabitation of his wife with another, has no cause of action to punish his wife or get her punished if he fails to catch her red-handed. He can, at the most, divorce her, should he so choose. And if he catches her red-handed, he need not seek protection of law by going to the Court but can just be 'provoked' to kill her and/or her paramour and thus commit a still graver offence of 'murder'.

This inconsistency of treatment of similar offences and offenders is the domain of our Legislators to ponder over and to remove it once for all.

## IV. SUPPRESSION OF IMMORAL TRAFFIC IN WOMEN AND GIRLS ACT, 1956.

### (1) General Survey :

Women taking up the profession of prostitution find themselves in a very helpless situation since they have to live on the mercy of the person who has absolute control over the brothel. Further when once they take up this profession they are compelled to remain in it, in view of the fact that it will be difficult for them to turn a new leaf in their lives as no person would come forward to marry a prostitute. It will also be difficult for them to leave the profession and to return to the home of their parents or relatives since they will not be allowed to enter or be received in such houses due to their past immoral life. Thus, women following the profession of prostitution undergo a bitter and condemned treatment at the hands of the society and this experience will compel them even to make their daughters also prostitutes since they being the daughters of the prostitutes will also be subjected to the same treatment.

### (2) The objects and reasons of the Act :

The statement of the objects and reasons of the Suppression of Immoral Traffic in Women and Girls Bill read as follows :[30]

30. Published in the Gazette of India, Extraordinary, Part II, Section 2, Dt. 20th Dec., 1954.

"(1) In 1930 the Government of India ratified an International Convention for the Suppression of Immoral Traffic in Persons and the Exploitation of the Prostitution of others. Under Article 23 of the Convention, traffic in human beings is prohibited and any contravention of the prohibition is an offence punishable by law. Under Article 35 such a law has to be passed by Parliament, as soon as may be, after the commencement of the Constitution.

(2) Legislation on the subject of suppression of Immoral traffic does exist in a few States, but the laws are neither uniform nor do they go far enough. In the remaining States there is no bar on the subject at all.

(3) In the circumstances it is necessary and desirable that a Central law should be passed which will not only secure uniformity but also would be sufficiently deterrent for the purpose. But a special feature of the Bill is that it provides that no person or authority other than the State Government shall establish or maintain any protective home except under a licence issued by the State Government. This will check the establishment of homes which are really dens for prostitution."

The purpose of the enactment was to inhibit or to abolish commercialised vice, namely, the traffic in women and girls for the purposes or prostitution as an organised means of living. The idea was not to render prostitution *per se* a criminal offence, or to punish a woman merely because she prostitutes herself. A careful scrutiny of the Suppression of Immoral Traffic in Women and Girls Act, 1956, clearly reveals that the Act was aimed at the suppression of commercialised vice and not at the penalisation of the individual prostitute or of prostitution itself.

## (3) Salient features of the Act :

### (i) Prostitution for Pleasure :

A very important barrier which comes in the way of an effective prosecution of an offence of immoral traffic is that cases of "Clandestine prostitution" are not within the purview of the Act. According to Section 2(e) prostitution means, "the act of a female offering her body for promiscuous sexual intercourse for hire, whether in money or in kind". This definition does not cover the act of indiscriminate lewdness which is often a necessary fore-runner to promiscuous sexual intercourse. In other words, sexual intercourse 'for pleasure' is not an offence under the Act. Therefore, the offender can always take the plea that it was one 'for pleasure' and not for either cash or kind in which case she is not liable for punishment under the Act. This barrier to a great extent obstructs the effective enforcement of law.

### (ii) Brothels :

The Supreme Court in the case of *Krishnamurthy Alias Tailor Krishnan v. Public Prosecutor*,[31] held that, "a solitary instance of the house being used for the purpose of prostitution is not sufficient to establish that the house was being kept as a brothel. The Supreme Court, however, held, "that a single instance coupled with surrounding circumstances is sufficient to establish both that the place was being used as brothel and the person alleged was so keeping it". This decision definitely imposes a barrier as the surrounding circumstances may not often be visible to the public eye, or even if visible, may be coloured so as to give a different interpretation quite in contrast to its factual reality by the intelligent scheme of the person managing it. The definition of "brothel" as given in Section 2(a) is "....includes any house, room or place, which is used for purposes of prostitution for the gain of another person or for the mutual gain of two or more prostitutes". The expression "for the gain of another person or for the mutual gain of two or more

31. *Krishnamurthy alias Tailor Krishnan v. Public Prosecutor*, Madras (Cr.Appeal No. 251 of 1964, dt.26-9-1966).

prostitutes" are sufficient to indicate that where a single woman prostitutes her act does not make the house a brothel.

**(iii) Living on the earnings of Prostitution :**

Section 4 makes it an offence to live wholly or in part, on the earnings of prostitution. In other words, if a woman carries on the trade for some other purposes without living on its earnings, she will not be guilty of the offence under this Section. This aspect of the law is a serious impediment in the trial of the offences under the Act. Since a woman who is instrumental in getting the trade of prostitution cannot be penalised, if she proves that she is not living on the earnings of prostitution. The course of law though satisfied about the guilt of the woman cannot but acquit her on the ground that she is not living on the earnings of prostitution.

**(iv) Criteria of 200 Yards :**

Section 7 of the Act, provides that it is an offence for any woman or girl to carry on prostitution and the person with whom such prostitution is carried on in any premises which are within a distance of two hundred yards of any place of public religious worship, educational institution, hostel, hospital, nursing home or such other public place of any kind as may be notified. The object of this provision is to prohibit the evil profession of prostitution in the vicinity of public places and to punish a woman as well as the man if committed within 200 yards of such places.

**(v) Visitors of the Prostitutes :**

It is surprising to note that there is no provision whatsoever to deter persons visiting the prostitutes. In reality it is the visitor who is responsible to a great extent for encouraging the woman or girl to carry on the profession of prostitution an if he desists from such visits this profession will automatically come to close. It is needless to emphasise here that if no provision is made for punishing the male visitors, Courts of law will always be placed in a helpless situation in effectively controlling the prostitution menace as the same

woman will be indulging in repeated offence under the Act and on whom, no measure of punishment would be of any avail.

**(vi) Women witnesses in search proceedings :**

Section 15 which deals with search in sub-section (2) provides that before making a search under sub-section (1) the Special Police Officer shall call upon two or more respectable inhabitant, one of whom atleast shall be a woman of the locality in which the place to be searched is situated, to attend and witness the search and may issue an order in writing to them or any of them so to do.

**(vii) Protective homes :**

Section 21 of the Act prohibits that no protective home shall be maintained except with a licence. This is an ample check against the establishment of homes which are really the dens for prostitution. The Courts of law often come across instances where protective homes maintained by the individual with a licence from the appropriate authority indulged in unsocial activities.

A glance at the aforesaid provisions of the Act would only reveal that the Act suffers from several weaknesses even in meeting its desired object of suppressing commercialised prostitution. A single woman may run a brothel without any fear of the grip of the Act. Prostitutes may take cover under 'intercourse for pleasure' by establishing that they do not make a living thereof. Persons visiting the brothels, if not within 200 yards of a public place, are not punishable at all. Again permission to run licensed protective homes is defeating the very purpose of the Act. Writing in the Illustrated Weekly of India[32] under the title 'The Other Bombay', Mr. *F.D. Colaaba Wala* gives revealing factors about the working of the Act. He says there are about 7,000 prostitutes in cages and 10,000 in numbered houses; more than 700 singing girls, 1000 eunuchs, 15,000 pimps and 10,000 **vars** (protectors). These are the statistics of a single city of the country, which is fortunately or unfortunately 'The Gateway of India'.

32. Vol. xciii -19, dated 7-5-1972, p.41.

# *Chapter - VI*

# CONTEMPORARY PROBLEMS OF ABNORMAL SEXUAL RELATIONS

The norms of every society tend to link the sexual act to some stable or potentially stable social relationship. Men consider women as sexual property to be prohibited to other males. They, therefore, find promiscuity on the part of the confined by law to marriage.

But there is another view of a society in which there is no restriction whatever on sex outside the marriage. Dr. *Carstairs* holds that, "a new concept is emerging of sexual relationships as a source of pleasure, but also as a mutual encountering of personalities in which each explores the other and at the same time discovers new depths in himself or herself, This concept of sex as a rewarding relationship is after all not so remote from the experience of our maligned teenagers as it is from that of many of their parents".[1] The modern trend of outmoding chastity is primarily because girls and boys are afraid of being **social out-casts**. Taking his seemingly sophisticated and popular friends as examples, the insecure young person who wants to be accepted socially is afraid to hold back from what may seem general custom. Boys from schools come with a plea for liberty of action, unshackled by tradition or morality. A sixth former from Noting Hill and Ealing High School writes : "Give me a prostitute who recognises the demanding sexual appetite in all healthy people, rather than a virgin who abhors all physical contact because human-beings are unclean. Give me the honest homosexual rather than the more-clever-by-half expurgator of other people's immorality—the writers of certain Sunday papers. If chastity can free herself from the shackles of perverted thought, she deserves a rollicking sexual life with twenty men if one does not satisfy her. She will probably live to be a hundred".[2] Many practices of the young

1. G.M. Carstairs : '*This Island Now*'. The B.B.C. Reith Lectures 162; Hograth Press, pp.50-51.
2. Edward Patey, Young People Now, London S.C.M. Press Ltd., 1964, p.27.

are disapproved by the general public but nevertheless expected and ignored. Among youth a 'real-man' may be one adept at seducing girls, a 'real sport' may be a girl willing to be seduced.

The primacy of marriage and the family in sex regulation accounts for the relative force and universality of certain well-known sex mores. It explains for instance, the principle of legitimacy (which establishes a family), the incest taboo (which eliminates overt rivalry from nuclear family), and the rule that coitus is obligatory within marriage (the only universal positive sex rule).[3]

The other view about the marital tie is that marriage is not for intercourse, but intercourse is for marriage.[4] In other words, it means marriage is just a sexual contact implying only momentary gratification. The women are available for extra-marital coitus (prostitutes, concubines, mistresses, servants and pick-ups). And premarital intercourse - either socially sanctioned, as in the Scandinavian countries or reluctantly tolerated, as in the United States - allows Courtship to approximate a trial marriage. Premarital intercourse is viewed by some as an evil, by others as a good. Pornography is widely condemned but because of solicitude for press freedom, not suppressed. Nudity is regarded by some as obscene and others as wholesome. Abortion is seen both as the solution of a problem and as a problem in itself.

Sex regulation, however, has not become completely paralysed. Individuals have a stake in sexual bargaining, and since they cannot always protect their interests, the community at large helps them. Children and youth are particularly vulnerable to sexual aggression. For such reasons, there is majority agreement on the desirability of minimising certain by-products of sexual activity. Illegal abortion, venereal disease, AIDS, illegitimate birth, forced marriage, organised procuring, are widely regarded as evils. Rape,

3. Robert K. Merton, Robert Nisbet, 'Contemporary Social Problems', 3rd Ed., p.319 Art. *Sexual Behaviour*, Ch.7.by Kingsley Davis.
4. Kingsley Davis, Art. *Sexual Behaviour*, in 'Contemporary Social Problems', p.325.

child molestation, sale of girls, incest an adultery are the widely disliked sex relations in all the societies.

As for licentiousness to pre-marital coitus, the argument favoured is that the unmarried are generally young and sexually at their peak.[5] The modern "promiscuous peer-group system" permits intercourse freely among young unmarried people but condemns unmarried reproduction, obviously requiring abortion or contraception. As condoms, diaphragms, spermicidal jellies and steroid pills become increasingly available to teenagers, full coitus became more frequent. A 1960 survey among students at four People's Colleges in Sweden found that 40 per cent of the girls had experienced intercourse. A 1965 survey of the same colleges found that 64 per cent had done so. A recent study of 497 students (average age 17) at two schools in Grebro found that 46 per cent had had intercourse.[6] In the United States, at the age specific rates of 1965, each thousand women living from age 10 to 50 would experience approximately 48 rapes. In a study of girls at Ohio State University, Kirkpatrick and Kanin found that 56 per cent of 291 girls respondents had been offended at least once during the preceding academic year by sexual aggression.[7] The offended girls usually felt, it would injure their own reputation if they reported the offence. In the lower class in Britain, pre-marital intercourse appears to be taken for granted; yet a girl runs the danger of injuring her marriage prospects if she gets a reputation for promiscuity.[8]

We shall now make a brief study of the outcomes of pre-marital and extra-marital sex relations as also other sexual misbehaviors as could be found in India and the other civilised and developed countries of today.

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5. Kingsley Davis, *Sexual Behaviour,* in Contemporary Social Problems, o.p.cit., p.331.
6. Sex and Society in Sweden (New York) Randam House, 1967 pp.18-20.
7. Kingsley Davis, *Sexual Behaviour*, Ibid., pp.335.
8. Mary Morse, *'The Unattached'*, (Baltimore : Penguine Books) (1965) pp.116, 164-65.

## (1) Obscenity, Nudity and Pornography :

Strictly speaking these are not the effect but the cause of the illegal sexual relations. Obscenity is a quality of arousing an indecent or morbid feeling in those who are easily amenable to any sexual gesture. It is a relative term and varies according to the feeling of sexy object and literature. Cabarets, Nudity shows and Pornography are a few forms of Obscenity. The A.P. U.P.I. International News Agency released a news from Hamilton (Ontario) on 27-7-71 describing the "Miss Nude World Competitions for 1971". *Rosemarie Hess* who was crowned Miss Nude World 71 remarked after the competition, seen by 3,000 persons, that "once they have seen me for five minutes, there is nothing more to look at. I think a little girl in a Bikini is more interesting than some in the nude".[9] The three editions of the English Blitz,[10] contain a series of articles on Sex films, by Mr. *Krishna*, wherein it is exposed that blue films, blue books, colour slides, showing sex acts and pornographic publications are spreading fastly in India despite the penal provisions in the I.P.C. against such obscenity. Even 'live blue shows' are reported to be performed which are watched through 'Peep-holes'. Girls indulge in the act of voyeurism and lesbianism. One of those articles contains a story of a middle-aged woman with a unique dog trained to make love to her. One of the rooms of her house has a glass panel through which those outside can watch the dog having sexual intercourse with the woman, for about 10-15 minutes. Similar are the cabaret performances in hotels - so disgraceful and disgusting as defying description.

## (2) Venereal Disease :

It is one of the problems associated with sex freedom. V.D. is the Cinderella of communicable diseases. Sri *William Osler*, the great scholar physician, calls "V.D. the most formidable enemy of the human race, an enemy entrenched behind the strongest human

9. The Deccan Chronicle (Daily), Secunderabad, Issue, dated 28-7-1971.
10. Blitz Weekly, Bombay, dated 19-6-71, 26-6-71 & 3-7-71.

passion and the deepest social prejudices."[11] Syphilis, gonorrhea and chancroid are the commonly known V.Ds. Women suffer from inflammation of the Fallopian tubes (Salpingitis). In groups with high rates of venereal infection, childlessness is correspondingly high. Public Health officials foresaw some 4 million cases of syphilis and 15 million cases of gonorrhea all over the world, according to a report from Pan American Health Organisation of the W.H.O.[12] England and Wales recorded together 78,000 of V.D. in two years. The British Family Planning Association Reports that there is an alarming increase in V.D. amongst the country's teenagers with a 20 per cent rise between 1960 and 1969. (News report in the Indian Express Daily, Vijayawada, dated 28-6-71 at page 12). In India too similar alarm has been sounded. The Central Minister of Public Health, Mr. *U.S. Dikshit* (as he then was) told the Rajya Sabha on 25-5-1971 that there are 142 V.D. Hospitals in the country and 50 are going to be added to meet the increasing needs.[13] Women who start coitus early and have numerous sex partners and wives whose husbands are promiscuous appear more susceptible to V.D. than others.[14]

## (3) AIDS :

AIDS, which is one of the fatal venereal diseases, is rapidly spreading throughout the world. "In India the number of infections had increased to around three to four millions, from just a few cases in 1986", what it was said by Mr. *Atal Behari Vajpayee*, the Prime Minister of India while addressing a special meeting of Members of Parliament organised to consider the measures to eradicate the disease at Vigyan Bhavan, New Delhi on 11th Dec. 1998. He asked the people to just imagine what the scene would be like in another 12 years. He shudder even to contemplate the numbers.

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11. Dr. R.V.Rajam : "*V.D. the Cinderella of communicable diseases*", published in the Hindu Weekly Magazine, dated 9-1-72.
12. *Ibid.*, para 4.
13. A News report in the Daily Siasat, Hyderabad, dt. 26-5-71.
14. *American Journal of Public Healt*h, Vol.57(May 1967) pp.803-29, 840-47.

A major Syringe manufacturer puts the figure in between 20 to 50 millions by the turn of the century. According to the company, the rate of growth in India is 60.7 per cent a year compared to the world growth figure of 16.4 per cent. Further still, the company warns: "if AIDS cases keeps growing at this rate, India's entire population of 940 million people shall be HIV-affected by the year 2013". The Budget provision for the financial year 1998-99 is Rs.110.60 crores to treat 6059 full blown cases and 78,000 HIV infected.

India is now contemplating to combat this dreadful disease by adopting two measures: one is to make vaccine and the other is to give sex education to the masses including children. The [15]Prime Minister of India while addressing the members of Parliament said, "I do not think we should hesitate to tell children about the process of growing up the disease and its implications. The growing threat of HIV/AIDS in the Country points to the urgency for doing this.

He stressed the need for the Indian Council for Medical Research (ICMR), Centre for Scientific and Industrial Research (CSIR), Department of Biotechnology and other institutions, which have expertise the vaccine development to be brought together to synergise their efforts. He urged the Union Health Minister Mr. *Dalit Ezhilmalai,* to take the lead and organise a team to explore the possibility of developing an indigenous vaccine in the most effective fashion.

The primary focus of AIDS education has degenerated into a glorification of safe sex. A programme conducted in July 1998 in Delhi for Class IX students told them that kissing is safe since it would need exchange of 20 litres of saliva to transmit the virus. Another programme in Mumbai targeted the pre-teens. It involved asking students about their interpretations of love and relationships, showing pictures of parts of body and asking them to name their favourite and most disliked parts.

The most favoured method in statistical jugglery is to conduct

15. *The Hindu*, Hyderabad Edition, dt. 13-12-1998.

a random blood sample survey among the high risk population, mostly prostitutes and truck drivers, and project the per centage figures for the entire State. Truck drivers are particularly targeted with the argument that they seek the services of prostitutes on trunk routes. So NGO (Non-Governmental Organisation) activity is thriving around their usual tea haunts, where condoms are freely thrown around with no thought about the children and families in the vicinity. While truckers are too weak to protest, a State Government had to quickly withdraw a programme to supply free condoms to policemen and even apologies to their association.

The bias against the underprivileged is clear even in the global campaign. Asia and Africa are projected as the worst-hit and even UNAIDS promotional pamphlets sport pictures of blacks and Orientals being counselled by whites.

Condom promotion in the name of AIDS prevention has virtually degenerated into promiscuity promotion. Doordarshan once had to withdraw its 'education' (sensitisation or 'outreach' in the new NGO lingo) programme following widespread complaints that the AIDS campaign is bringing obscenity into the drawing rooms. The UNAIDS India Country profile report alleges that "this has had a negative impact on a number of public service efforts *vis-a-vis* condom promotion, and collaborative efforts are currently under way between national and external agencies to address this problem".

[16]Mr. *R. Prasannan* who has contributed an article on AIDS by a caption of "Virulent Game" in "the Week" Magazine dated, Dec. 13, 1998, said: "**Kamasutra brochures are supplied in the name of sex education and communities are branded as store-houses of the virus. The condom has become the mascot of the new civilisation and condom-covered promiscuity a virtue.**"

### (4) Illicit Pregnancy :

Kingsley Davis writes in his article on 'sexual behaviour', no

16. *The Week* Magazine, dated 13th Dec., 1998.

body knows how may illicit impregnations there are..... In the United States in 1965, for example, my estimate is that approximately 13,24,000 illicit pregnancies occurred. The calculation has no claim to accuracy because the largest component (induces abortion) is unknown, but as a conservative guess it suggests that one-fourth or more of all pregnancies in 1965 were of unmarried women."[17]

Illegitimate births result either from an unsuccessful effort to trap a man into marriage, from sheer indifference or from an inability to find a reliable and/or Cheap abortionist. Among a sample of 1962 unwed mothers studied in California in 1954, only 55 per cent claimed that the child was conceived in a friendship or love relationship[18] (the remainder, perhaps being prostitutes). According to the West German Daily, "**Velt em son tog**", eleven lakh fathers of illegitimate children live in West Germany of whom eight lakhs are married and have legal wives too.[19] A Reuters release from London on 27-6-71 gives the report of the British Family Planning Association, according to which one in every five brides in Britain is pregnant on her wedding day, in which, England and Wales records one in three and Scotland one in four. During 1970, more than 1,00,000 unmarried women and girls became pregnant. The report further says that a minimum of three million women in Britain risk pregnancy every time they make love.[20] To Britain also goes the credit of having an unwed Member of Parliament in the House of Commons. another Reuters release of 4-7-71 says that 23 years old Miss *Bernadetta Devlin* from Northern Island's Catholic minority and the youngest member of British Parliament, now a mother to-be, has refused an offer by her aunt to adopt her baby when it is born.[21]

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17. Robert K. Merton, Robert Nisbet 'C.S.P. p.336.
18. Clark Vincent, '*Unmarried Mothers*' (New York, free Press 1961) p.83.
19. A News item in *Siasat Daily*' of Hyderabad, dt. 15-6-71.
20. News Report published in the '*Indian Express Daily*' Vijayawada Ed., dt. 28-6-71 at p.12.
21. *Ibid.* A News Report in its issue of 5-7-71 (p.9).

## (5) Forced Marriages :

Illicit pregnancies almost as often lead to forced marriages as to illegitimate births. In the period 1964-66, in the United States, 65 per cent of all pre-maritally conceived but legitimate (on account of subsequent marriage though underaged) first births were to girls under 20, when the child was born, whereas among all legitimately conceived births only 24 per cent were to such young mothers. Again during 1965, 49 per cent of American Women getting divorces were married at ages under 20.[22] *Kingsley Davis* in his article on Sexual Behaviour, observes, that the marriages in which the bride is not only young but also pregnant are the least stable of all. In so far as pre-marital pregnancy leads to forced marriages, it leads to tragedy".[23]

## (6) Abortion :

After World War II, Japan and some Scandinavian and East European countries enacted legislation allowing abortion on liberal grounds. Three States of the U.S.A., Alaska, Hawaii and New York have made abortions 'in the first months of pregnancy, a matter to be determined by a woman and her doctor'. Colorado and others States in the U.S. have allowed abortion in case of rape or incest or when the mother's health or the child's heredity is at risk. The Indian Parliament too has enacted the 'Medical Termination of Pregnancy Act, 1971' in August 1971, which permits termination of pregnancy if it involves a risk of grave injury to the physical or mental health of the mother to be, whether she is single or married.

"The Illustrated Weekly" issue of 29th August 1971[24] has given certain vital statistics about abortion. It shows that the youngest pregnant girl was just six years old and the oldest was of 60 years. The maximum number of abortions a woman has had in

22. Divorce Statistics Analysis, United States, 1964 and 1965' Series 21. No.17.
23. Robert K.Merton, Robert Nisbet, *Contemporary Social Problems*, o.p.cit., p.337.
24. Vol.XCI-35 (p.17.)

Japan, is 36. And even in countries where abortion is not yet legalised, abortion does occur. In Chile, one out of every four interviewed had had atleast one abortion. In Mexico, three out of every ten had had it. In Rome, most women interviewed had had two abortion for every three children they bore. In Belgium, whose population is 9.5 million, there are two to four lakh abortions every year, while in West Germany they are one to three lakhs.

A leading gynaecologist of India, Dr. *Purandare* says that there are no reliable drugs till now to induce abortion though many claims were made. He further says, of all operations in gynaecology, abortion is the most difficult one. He also warns that abortion is not so safe as is imagined.[25] There have been till now, 65 lakh abortions every year in India. The British Family Planning Association's Report of 1971 reveals a steep rise in teenage abortions in Britain. For a single quarter of the year 1971, there was a jump of 28 per cent over 1970's corresponding quarter.[26] In a letter to the Editor of the Deccan Chronicle, Secunderabad (Issue dated 18-7-71) Dr. *B.S. Surti*, a famous surgeon of Hyderabad, holds that a fertilized ovum is as much a human being as any adult and that abortion means the death of a human being. He maintains that "induction of abortion is homicide, in fact the meanest and most despicable form of assassination since the human victim is so tiny and defenceless". Dr. *J. Mary Carla* of Secunderabad in a similar letter published in the Deccan Chronicle dt. 25-7-71 says that hospital is for curing ills but not for killing. Though abortion is not so innocuous yet it is attended by its own dangers to the individual concerned. It directly encourages immoral traffic. She further adds that when abortions are legalised, there would be no fear for illegitimate conceptions and the ultimate result would be, not legalisation, but 'liberalisation of abortions'. Another

25. Dr. B.N. Purandare's addressed to the Hyderabad Rotary Club on '*Legalisation of Abortion*' as published in the Deccan Chronicle, Secunderabad dated 15-7-71 (front page).
26. News item in the *Indian Express*, Vijayawada, dt. 28-6-71.

critic of Hyderabad, Mr. *Varghese Mulanjaneny* in his letter to the Editor of the Deccan Chronicle (published on 28-7-71) says that Japan, Sweden, England and Italy are reaping the ill-consequences of legalised abortions in the forms of promiscuity, divorce, venereal diseases, ill-health and mental imbalance of mothers. 70 per cent of the victims of abortions in Sweden are reported by psychiatrists as insecure and psychologically immature.

### (7) Prostitution:

Prostitution is nothing but selling sexual favours. "The Time" magazine of America says that a grand total of 315 billion episodes of commercial sex take place in the U.S. every year for a collective payment of 2.25 billion dollars.[27] A survey report of the Andhra Pradesh Unit of Association of Moral and Social Hygiene[28] reveals that 55% of the prostitutes took to the profession on account of 'poverty' while 24.3% for 'bad society'. 31.4 % of them are widowed and 45% deserted. 63.3% of the dancing girls and 55% of the prostitutes suffered from venereal diseases.

Writing under the Caption 'Women Criminals in India' in the 'Femina' Mrs. *Shanta Wathwa* says "Crimes committed by women are usually of the domestic or sexual variety, for example, theft, receiving stolen property, poisoning, abortion, infanticide, suicide and sometimes bigamy or adultery or procuring minor girls for improper or immoral purposes. A large number of women resort to prostitution, which further leads to commission of crimes arising out of jealousy, and therefore murder; criminal assault and homicide are also not uncommon".[29] Writing in the Illustrated Weekly of India under the head 'How to prevent Sex Crimes' Mrs. *Benedict Costa* says, 'the main sex crimes are heterosexual, homosexual and minor aberrations. The gravest of them is rape. An average 3,000 rape

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27. The "Hindu" Daily Madras Weekly Magazine, dt. 9-1-72 under the caption *V.D. the Cinderella of Communicable Diseases.*
28. Published in the '*Times of India*', Bombay, dt. 17-4-72.
29. Vol.13 No.6 of 17-3-72, p.31.

cases end in conviction every year. Atleast thrice as many are not reported to the police because of ignorance, fear and the scandal involved. How does the law deal with sex offenders? The Indian Penal Code stipulates 10 years' rigorous imprisonment for grave sex crimes. Deterrent punishment is called for when a minor is exploited by an adult. Brain operation, surgical castration, use of sex hormones and psychiatry are the methods used to cure sex psychopaths."[30] In America it is said, one is forcibly raped every 17 minutes.[31] In a single Bombay Police Hospital, 500 cases of rape are brought every year. And these are the statistics when the fact according to Mr. *S.R. Kulkarni,* Deputy Commissioner of Bombay, C.I.D. (as he then was) is that "a majority of cases do not come to the notice of the authorities - because the woman or her husband or parents are unwilling to face the publicity and the stigma which is attached to the victim of a sexual assault."[32]

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30. Vol.XCIII-20, dt. 14-5-72, p.6.
31. Art. *Violence*, by Amitai Etzioni; Contemporary Social Problems, o.p.cit., p.709.
32. Illustrated Weekly of India, dt. 14-5-72, p.11.

# CONCLUSION

The Report of the Committee on Homosexual Offences and Prostitution, 1957, widely known as the 'Wolfenden Committee's Report' has undoubtedly opened wider dimensions on the question of morality and its enforcement through law. This Committee was appointed in England in 1954 to consider the state of law relating to both prostitution and homosexuality. As to prostitution, the Committee has unanimously recommended that it should not itself be made illegal; legislation should, however, be passed "to drive it off the streets", on the ground that public soliciting was and offensive nuisance to ordinary citizens. As to homosexuality, the Committee recommended by a majority of 12 to 1 that homosexual practices between consenting adults in private, should no longer be a crime.

This recommendation of the Wolfenden Committee is based on the principle stated simply in Section 61 of its Report, which says, "there must remain a realm of private morality and immorality which is, in brief and crude terms, not the law's business." These developments in England have had near counterparts in America. In 1955, the American Law Institute published with its 'Model Penal Code' a recommendation that all consensual relations between adults in private should be excluded from the scope of the criminal law. Its grounds, (*inter alia*) were that "no harm to the secular interests of the community is involved in a typical sex practices in private between consenting adult partners."[1] The Model Penal Code further says that "there is the fundamental question of the protection to which every individual is entitled against State interference in his personal affairs when he is not hurting others.[2]

This modern trend in regard to sexual pleasure is inspired by the theory propounded by *John Stuart Mill*, one hundred years ago, in his essay, 'On Liberty,' wherein he says that "the only

1. *Model Penal Code*, Tentative Draft No.4, p.277, American Law Institute.
2. *Ibid.*, p.278.

purpose for which power can rightfully be exercised over any member of civilized community against his will is to prevent harm to others."[3] Section 13 of the Wolfenden Committee's Report exhibits a striking similarity to the above principle expounded by *Mill*. Section 13 of the Committee's Report reads thus:

> "The function of the criminal law, as we see it, is to preserve public order and decency, to protect the citizen from what is offensive or injurious and to provide sufficient safeguard against exploitation of corruption of others particularly those who are specially vulnerable because they are young, weak in body or mind or inexperienced...."

This conception of the positive function of the criminal law was the Committee's main ground for its recommendation concerning prostitution that legislation should be passed to suppress the offensive public manifestations of prostitution, but not to make prostitution itself illegal.

In this background, if we look at the law relating to fornication in the Islamic legal system, we will be drawn to the conclusion that Islam has just attempted to enforce a moral rule through State's intervention, which means nothing but "Legal Coercion" of private morality; because according to *Mill*, **zina**, or fornication can be penalised only when it hurts others or causes harm to them. And thus in the list of sexual offences, only 'rape' can aptly be justified to be legally enforced as it is committed by coercion against the will of the other partner. Adultery can also, come within its scope in a limited sense, because, though both the parties consent mutually, yet the feelings of the husband are deemed to be hurt with the adulteration of his wife by a stranger, since his consent - either express or implied - was not obtained prior to the commission of the 'act'. It is an offence not against the wife or the State, but, the husband.

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3. On Liberty Chapter I.

Will this approach to the subject simply explain away the matter? Our discussion of the pre-marital, extra-marital and abnormal sexual relations in the preceding Chapter does call for a deeper analysis of the subject. While *Mill* advocates the theory of separation of private morals from the vicinity of law, there are others who take an extremely opposite view on the subject. The great Victorian Judge and historian of the Criminal Law, *James Fitzjames Stephen* criticises *Mill* in his book, 'Liberty, Equality and Fraternity.'[4] which he wrote as a direct reply to *Mill's* essay, 'On Liberty' and demonstrates that law might justifiably enforce morality as such. He takes the extreme view that law should be 'a persecution of the grosser forms of vice"[5] Lord *Devlin*, a most distinguished writer on criminal law and a member of the House of Lords, observes in his condemnation of the Wolfenden Committee's Report (which contends that 'there must be a realm of morality and immorality which is nor the law's business) argues that "the suppression of vice is as much the law's business as the suppression of subversive activities."[6] As to the question whether the legal enforcement of morality is morally justified, Lord *Devlin* answers in the affirmative on the general principle that "it is permissible for any society to take the steps needed to preserve its own existence as an organised society."[7] He thinks that immorality - even private sexual immorality - may, like treason, be something which jeopardises a society's existence. One may, of course, ask for the justification for the use of legal coercion by any society against something, *prima facie* objectionable for the sake of some countervailing good.

Both in England and in America as also in India, the criminal law still contains rules which can only be explained as attempts to enforce morality as such, to suppress practices condemned as immoral by positive morality though they involve nothing that would ordinarily be thought of as harm to other persons. A few such examples are, laws against unnatural sexual offences, sodomy, bestiality, incest, living on earnings of prostitution, keeping a brothel, leading others morally astray,

4. James Fitzjames Stephen, 2nd Ed., London 1874.
5. James Fitzjames Stephen, *Liberty, Equality and Fraternity,* p.162.
6. Lord Devlin, *Essay on the Enforcement of Morals,* Oxford University Press, 1959.
7. *Ibid.*, pp.13-14.

laws against abortion, laws against bigamy or polygamy including polyandry, laws against suicide and the practice of euthanasia or mercy killing. For this, Lord *Devlin* asserts, there is only one explanation." and this is that "there are certain standards of behaviour or moral principles which society requires to be observed."[8]

We, can, therefore, furnish an affirmative reply to the question, 'ought immorality as such to be a crime'? It is a historical fact that the development of law has been influenced by morals, sometimes covertly and slowly through judicial process and sometimes openly and abruptly through legislation.

The Islamic law of fornication also needs appreciation in the light of the above discussion on the validity of legal enforcement of moral wrongs. The legal system of Islam which has a Divine sanction, takes the entire aspect of illicit co-habitation into its domain, without in any manner, giving concession to the element of consent. It is here that a marked distinction can be found in the modern law relating to sexual behaviour *vis-a-vis* the Islamic law. Islam condemns the very act of sexual intercourse outside the marital tie. On the other hand the contemporary attitude towards prostitution is one of tolerance as a 'necessary evil', but however, intolerance of it's 'open manifestation'. If prostitution *per se* is not forbidden, street solicitation and maintenance of brothels etc. are penalised. This is perhaps the reason why man is leaning, step by step, towards granting licentiousness to abnormal, pre-marital and extra-marital sexual behaviours. The working of the Islamic law even today, in certain isolated places, stands testimony to the fact that the contemporary social problems of man in so far as crimes of sex are concerned, can be solved to a greater extent, only through an adherence to the laws of Islam. *Robert K. Merton* and *Robert Nisbet* have quoted an instance of an Egyptian village, which is a remarkable example of how the Qur'anic law of fornication has worked there. They quote from *Hamed Ammar's* article on "Growing up in an Egyptian village" thus:

> "Each family bases its reputation on the sexual purity of its women. Each household exerts the utmost vigilance to prevent the unmarried girls from committing any sexual

8. *The Enforcement of Morals*, o.p.cit., p.8.

> indiscretion. For village boys and girls any conversation about sex is taboo... Chastity as a moral and religious ideal implies the avoidance of any stimulating pleasurable influence from the opposite sex... Sexual pleasure of any kind outside the marriage tie is condemned by the Qur'an....Manifestation of this excessive repression and fear of sex are obvious in the veiling of adolescent girls and women and the hiding of the breast contours with extra pieces of cloth..."
>
> "In this community, I heard of no cases of adultery or illegitimate children for the last thirty years....."[9]

This stands in glaring contrast to a modern city of our times practising changed concepts of chastity and morality in relation to law. It may also be remarked in this connection that the legal system of Islam cannot be conceived of in a society which is torn of the concept of chastity as preached by that religion. The Islamic law views of the society as an organic whole and applies its principles to the entire body polity, as such. No rule of law as prescribed by Islam can be examined and applied in isolation from the entire body of laws and the social structure Islam builds. Islam does prescribe a hundred stripes for the unmarried and stoning to death for the married partners in the crime of fornication. But of course, it applies to a society wherein every trace of suggestiveness has been destroyed, where mixed gatherings of men and women have been prohibited, where public appearance of painted and pampered women is completely non-existent, where marriage has been made easy, where virtue, piety and chastity are current coins and where the fear of God is kept ever fresh in men's minds. These punishments are not meant for the filthy society, wherein sexual excitement is rampant, wherein nude pictures, obscene books and suggestive songs have become common recreations, wherein sexual perversions have taken hold of the cinema and all other places of amusement, wherein mixed, semi-nude parties are considered the acme of social progressiveness and wherein economic conditions and social customs have made marriage extremely difficult.

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9. Rober K.Merton Robert Nisbet, *Contemporary Social Problems*, o.p.cit., p.331.

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